

A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000

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As the twentieth century comes to a close, the National Labor Relations Board has come 180 degrees from its origins in the New Deal era. The Congress that created the Board in 1935 envisioned a body made up wholly of "impartial Government members," and consistent with this spirit, early Board appointees were drawn from government or other neutral backgrounds. President Eisenhower, however, the first Republican President since the passage of the Labor Act, quickly broke with this tradition and appointed individuals from the management side to the Board. Although such partisan appointments were originally a source of controversy, over the last half-century they have gradually become not only accepted, but the norm. Indeed, the two most recent Boards have consisted of two management and two union lawyers flanking a neutral as chair and swing vote—the very tripartite model of the agency that had been explicitly considered and decisively rejected by the Congress that brought the Board into being.

In this article, Professor Flynn traces the evolution in NLRB appointment norms and practices from 1935 to today, assesses the impact of the increased prevalence of partisan Board members on NLRB decision-making, and attempts to explain why the partisan appointees of the last fifteen years have, according to the empirical data, been so much more one-sided in their voting than were their predecessors from similar backgrounds. She concludes that this marked increase in partisan voting, which has been particularly pronounced during the Clinton years, is a product of a shift toward greater senatorial control over the appointments process at the expense of the President. She further concludes that this shift in the norms governing the NLRB appointments process, which is reflected most starkly in the rise of "packaged" appointments, is part of a more general shift in presidential appointment norms. Thus, this article places contemporary NLRB appointment practices not only in sharp juxtaposition to the practices that held sway in the Act's early years, but in the context of larger trends in the political process.

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You cannot make a man an impartial judge in his own case. . . . [T]he president of the American Federation of Labor . . . could not possibly sit there in an impartial manner. . . . [I]f you want[] to create an impartial tribunal, it will not be composed of [the representatives of] employers and employees.¹

James Emery, General Counsel, National
Association of Manufacturers—Hearings
on proposed Labor Disputes Act, 1934

I say, gentlemen, that . . . when you clothe the board with any such powers as these the individuals composing it should be selected to represent one interest and one interest alone, and that is the public interest.²

Nathan L. Miller, General Counsel, United
States Steel Corporation—Hearings on
proposed Labor Disputes Act, 1934

* * *

Let us recognize reality. Labor law is a dichotomous world. Labor lawyers represent either management or labor, and they tend to share the sentiments of their clients on labor-management issues. . . . If the Board is to be filled with individuals who have expertise in the labor laws, there is no avoiding the necessity to draw from pools of individuals who have views on the law which can generally be classified [as] pro-labor or pro-management.

The current system ignores this reality[.] . . . it pretends to seek candidates who are "acceptable to all sides." . . .

A healthier approach may be to acknowledge that Board members can only be drawn from the two camps and let each camp suggest its own candidate. . . . [W]ith a Democrat in the White House, the labor camp will get three picks and, with [a] Republican [president], management gets three.³

Daniel Yager, Labor Policy
Association—Oversight Hearings on
National Labor Relations Board, 1996

¹ *A Bill to Equalize the Bargaining Power of Employers and Employees, To Encourage the Amicable Settlement of Disputes Between Employers and Employees, To Create a National Labor Board, and for Other Purposes: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor, 73rd Cong. 340, 383 (1934) [hereinafter *Hearings on S. 2926*], reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 374, 417 (commemorative reprint 1985) [hereinafter 1 LEG. HIST. OF THE NLRA] (testimony of James Emery, General Counsel, National Association of Manufacturers).*

² *Hearings on S. 2926, supra* note 1, at 883, 889, reprinted in 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 921, 927 (testimony of Nathan L. Miller, General Counsel, United States Steel Corporation).

³ *Examining the Activities and Progress of the National Labor Relations Board: Oversight Hearing Before the Comm. on Labor and Human Resources, 104th Cong. 91 (1996), reprinted in THE NLRB: AN AGENCY IN CRISIS, STATEMENT OF THE LABOR POLICY ASSOCIATION BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, OVERSIGHT HEARING ON THE NATIONAL LABOR RELATIONS BOARD 50 (1996) [hereinafter AGENCY IN CRISIS].*

INTRODUCTION

When the National Labor Relations Board (NLRB or Board) was founded in 1935, Congress envisioned the Board as a “strictly nonpartisan” body.⁴ The forerunner of the NLRB, the National Labor Board (NLB),⁵ had been set up on a tripartite basis, with an equal number of industry and labor representatives flanking a chair who represented the public interest.⁶ Senator Wagner’s original bill had retained this tripartite structure, providing for a board composed of two members “designated as representatives of employers, two as representatives of employees, and three as representatives of the general public.”⁷ Once it was determined, however, that the new agency—unlike the NLB⁸ and the board originally envisioned by Senator Wagner⁹—would be an adjudicatory rather than a mediation or arbitral body, “a consensus [emerged] that only the public should be represented.”¹⁰ The final legislation thus deleted any reference to partisan

⁴ See STAFF OF SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONGRESS) AND S. 1958 (74TH CONGRESS) § 3 (Comm. Print 1935), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 1319, 1320.

⁵ This board was created by executive order in 1933. JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 15 & n.31 (1974) [hereinafter GROSS, *MAKING OF THE NLRB*]; IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–41*, at 173 (1970). In mid-1934, a subsequent executive order transferred its functions to a newly created body called the National Labor Relations Board. GROSS, *MAKING OF THE NLRB*, *supra*, at 72. This “old National Labor Relations Board” or pre-Wagner Act Board, which was authorized to conduct investigations, hold hearings, and make findings of fact, but had no decision-making authority, *see id.*, was of course supplanted by the new board created by the National Labor Relations Act, discussed *infra* notes 10–12 and accompanying text.

⁶ GROSS, *MAKING OF THE NLRB*, *supra* note 5, at 16, 25. The chair was Senator Wagner. *Id.* at 16.

⁷ See S. 2926, 73d Cong. § 201 (1934), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 4; *see also* H.R. 8423, 73d Cong. § 201, at 7–8 (1934), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 1131–32 (indicating that original House bill also provided for four partisan members and three representatives of the public interest).

⁸ See GROSS, *MAKING OF THE NLRB*, *supra* note 5, at 20 (noting that NLB’s objective was to prevent or settle strikes that might interfere with the economic recovery effort).

⁹ When introducing his original bill, Senator Wagner stated:

The . . . Board, under [this] legislation, is not designed to act chiefly as a policeman or a judge. Its chief function will be to mediate and conciliate industrial disputes, and to offer its services as an arbitrator whenever the parties so desire.

78 CONG. REC. 3443 (1934), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 17.

¹⁰ *A Bill to Promote Equality of Bargaining Power Between Employers and Employees, To Diminish the Causes of Labor Disputes, To Create a National Labor Board, and for Other Purposes: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong. 291 (1935) [hereinafter *Hearings on S. 1958*], *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 at 1617, 1677 (commemorative reprint 1985)*

representation,¹¹ and it was fully understood that the new NLRB was to be staffed solely by “three impartial Government members.”¹²

Consistent with this spirit, in the early years of the National Labor Relations Act (NLRA or Act),¹³ the notion of appointing someone from the management or union side to the Labor Board was considered completely verboten; it was generally agreed that such a person could not possibly be fair to both sides,¹⁴ much less be perceived as such, and most Board members were drawn from

[hereinafter 2 LEG. HIST. OF THE NLRA] (statement of Sen. Wagner); *see, e.g., Hearings on S. 2926, supra* note 1, at 236, *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 266 (William Leiserson, chair of National Mediation Board) (stating that since the Board’s primary function would be to enforce the law, “the suggestion that the board have partisan representation on it, from the point of view of half labor and half capital, is essentially wrong from an administrative point of view. If the law is to be enforced, the person has to represent the Government only.”); *id.* at 220, 230, *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 250, 260 (Otto Beyer, director of labor relations for Federal Coordinator of Transportation) (stating that the Board should act as a “labor judiciary,” instead of a tripartite arrangement, the Board members should be “absolutely nonpartisan.”); *id.* at 611, 612–13, *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 645, 646–47 (Walter Carroll of the New Orleans Chamber of Commerce) (stating that because it is a judicial board, the NLRB should not be one in which “some of the members directly represent one of the parties litigant and owe a duty to them. . . . it would be better to have the board constituted of members who owe a duty to no one, just like the Federal courts”).

¹¹ *See Hearings on S. 1958, supra* note 10, at 291, *reprinted in* 2 NLRB, LEG. HIST. OF THE NLRA, *supra* note 10, at 1617, 1677 (Sen. Wagner) (explaining that, in light of consensus that only the public should be represented, the bill does not provide for representatives of industry and labor on the Board); *see also* National Labor Relations Act, ch. 372, § 3(a), 49 Stat. 449, 451 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (1994)), *reprinted in* 2 LEG. HIST. OF THE NLRA, *supra* note 10, at 3270, 3272 (Section 3(a) of Act states only that the Board “shall be composed of three members.”).

¹² STAFF OF SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONGRESS) AND S. 1958 (74TH CONGRESS) § 3 (Comm. Print 1935), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 1319, 1320. This comparison explained that whereas the previous bill had provided for government members, employer members and “worker” members, “by now labor and management agree with the Government experts in believing that a[n] impartial board is better than a board with [members] representing respectively workers and employers.” The Board was subsequently expanded to five members by the Taft-Hartley amendments of 1947. *See* Labor Management Relations Act, 1947, ch. 121, § 3(a), 61 Stat. 136, 139 (1947) (current version at 29 U.S.C. § 153 (1994)).

¹³ 49 Stat. 449–57 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (1994)).

¹⁴ *See supra* text accompanying note 1 (setting forth testimony of James Emery, General Counsel, National Association of Manufacturers); *Hearings on S. 2926, supra* note 1, at 611, 612–13, *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 645, 646–47 (reporting testimony of Walter Carroll, New Orleans Chamber of Commerce, rejecting notion of Board in which “some of the members directly represent one of the parties litigant and owe a duty to them. . . . [W]e must always remember that these labor representatives owe a duty . . . to the people whom they represent . . .”).

government or academia—never from industry or labor.¹⁵ Beginning in the Eisenhower years, however, both attitudes and appointing practices began to shift,¹⁶ and since 1970 a majority of the Board members appointed have come from management or union-side rather than neutral backgrounds.¹⁷ In recent years, moreover, the Board has been split between two management lawyers on the one hand and two union lawyers on the other, flanking first an academic¹⁸ and now a career Board employee as the chair and swing vote.¹⁹ In short, the once unimaginable has now become the norm, and the modern-day NLRB looks like nothing so much as the tripartite model for the agency that was explicitly considered and decisively rejected by the Wagner Act Congress.

This article attempts to explain just how this fundamental transformation in the nature of the National Labor Relations Board took place, and to assess its impact on the administration of the NLRA. Part I traces the evolution in Labor Board appointments over the sixty-five year history of the Act. It describes how the original taboo on appointing management or union-side personnel to the Board was broken, and how, once broken, the initial controversy over such

¹⁵ See *infra* notes 24–28 and accompanying text.

¹⁶ See *infra* notes 29–30, 57–58 and accompanying text; *infra* note 66.

¹⁷ See *infra* Appendix, p. 1454 (listing all NLRB members and their backgrounds).

¹⁸ See *A Sharply-Divided NLRB Faces the Future with a New Chairman*, EMPLOYMENT LAW ALERT (Nixon Hargrave Devans & Doyle LLP), May 1999 [hereinafter May 1999 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*) (reporting that in 1997–98, Stanford law professor William Gould presided over a Board “split down the middle” between ex-management lawyers J. Robert Brame and Peter Hurtgen and former union attorneys Sarah Fox and Wilma Liebman); *The Voting Records of the Members of the NLRB*, EMPLOYMENT LAW ALERT (Nixon Hargrave Devans & Doyle LLP), Apr. 1998 [hereinafter April 1998 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*) (noting that Chairman Gould is bound to be deciding vote, given sharp split between other four Board members); see also *infra* Table 2, p. 1408; Figure 2, p. 1409 (indicating that Gould’s voting record falls between the extremely pro-management records of Hurtgen and Brame and the extremely pro-union records of Fox and Liebman).

¹⁹ See *Voting Along Party Lines Continues at NLRB*, EMPLOYMENT LAW ALERT (Nixon Peabody LLP), Dec. 1999 [hereinafter December 1999 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*) (reporting that career Board employee John Truesdale, who has replaced Stanford law professor Gould as Board chair, presides over a “fractured agency” that is “split down the middle on partisan lines” between ex-management lawyers Hurtgen and Brame on the one hand and ex-union lawyers Fox and Liebman on the other); MAY 1999 EMPLOYMENT LAW ALERT, *supra* note 18 (noting that Truesdale will be “pivotal swing vote” on Board). As this article goes to press, the term of ex-management lawyer J. Robert Brame had recently expired, and the recess appointment of former union lawyer Sarah Fox, which followed the expiration of her term, was set to expire shortly. See *Former Member Brame Joins Law Firm, Gives Up Attempt at Serving Second Term*, 2000 Daily Lab. Rep. (BNA) No. 190, at A-8 (Sept. 29, 2000). Thus, absent quick action, careerist John Truesdale may shortly be acting as the chair and swing vote on a three-member Board split between a single ex-management lawyer and a single ex-union lawyer.

appointments gradually died down, to the point where the almost unrelievedly partisan character of President Clinton's Board appointments has drawn almost no notice whatsoever.

Part II assesses the impact of the increasing prevalence of Board members drawn from partisan backgrounds on NLRB decision-making. More specifically, it explores the question of whether Board members who come to the agency from the management or union side are more biased in their decision-making than are their counterparts from government or other "neutral" backgrounds. Rather surprisingly, perhaps, Part II concludes that the answer to this question is extremely time-dependent. While the Board members from partisan backgrounds who served prior to 1980 certainly tended to favor their "side of origin" in deciding cases, as a general matter their voting records were not significantly more one-sided than were those of many members drawn from government service.²⁰ During the last decade and a half, in contrast,²¹ the management and union-side lawyers on the NLRB have voted in a decidedly more one-sided fashion than their colleagues from nonpartisan backgrounds.²² The most recent appointees from the management and union sides, moreover, have compiled particularly lop-sided voting records, in which "votes for the 'other' side's position are . . . few and far between."²³

Part III explores the reasons for this temporal difference, and concludes that it is the product of a change in norms in both the NLRB appointments process and the presidential appointments process generally—and in particular, of a shift to greater senatorial control of the process at the expense of the President. It begins by describing the manner in which NLRB appointments were made up through the late 1970s, and explains why the nominees that emerged from this presidentially-driven process, even those from partisan backgrounds, tended to be relatively moderate in their decision-making. It then traces the shift in appointment practices that began in the late 1970s and early 1980s, with attention to both the selection and confirmation phases of the process. After analyzing the differing incentives of the President and individual senators and the internal structure and rules of the Senate, Part III determines that it is the Senate's assertion of significant control over the *selection* of NLRB nominees—which it has asserted in large part by insisting that the President acquiesce to certain of *its* choices as the price of getting any of his nominees confirmed—that is most responsible for the extreme nominees of recent years. And because the changes in

²⁰ See *infra* Table 1, p. 1405; Figure 1, p. 1406.

²¹ This article draws on two major studies of Board member voting patterns. One covers the period 1955–79, and the other began in 1985 and is still ongoing. See *infra* notes 178–82, 185–86 and accompanying text (describing these two studies). There is no data available on Board member voting for the period 1980–1984.

²² See *infra* Table 2, p. 1408; Figure 2, p. 1409.

²³ December 1999 EMPLOYMENT LAW ALERT, *supra* note 19; see also *infra* text accompanying notes 189–94.

the NLRB appointments process over the last decade and a half—such as the shift in the balance of power in favor of the Senate and the concomitant rise of “packaged” appointments—largely mirror those that have affected appointments to other agencies and even the federal judiciary, Part III concludes that the likelihood of a return to prior norms and to an era of less blatantly biased NLRB nominees is dependent primarily on larger political trends—and hence, nearly impossible to predict.

I. THE QUIET REVOLUTION

A. *The Era of Nonpartisanship: 1935–1952*

From the Wagner Act’s beginnings in 1935 through the 1940s, appointees to the Labor Board were drawn nearly exclusively from non-partisan backgrounds. Admittedly, there were as yet no “management” or “union-side” lawyers to even consider appointing, there being no such animals until the Act had been up and running for some years.²⁴ There was, however, a significant pool of in-house industrial relations specialists and union officials to call upon, but Presidents Roosevelt and Truman, in keeping with the spirit of the Act,²⁵ drew most²⁶ of

²⁴ Terry M. Moe, *Interests, Institutions and Positive Theory: The Politics of the NLRB*, in 2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 260 (1987):

[T]here really was no such thing as “labor law” until the board and the courts created it, and there was no labor bar within the legal profession to handle the new demand [created by the passage of the NLRA. However,] during the 1940s and 1950s, law schools adapted their curricula, practitioners began specializing in labor law, and the supply of attorneys rose to meet the regulation-induced demand.

Id.

²⁵ See *supra* text accompanying notes 4–12.

²⁶ The sole nominee from either labor or management during these years was Copeland Gray, nominated by President Truman in 1947. Gray had been the industrial relations director of an engineering company and then an industrial relations consultant to employers. See *Confirmation of Nominees for National Labor Relations Board: Hearing Before the Senate Comm. on Labor and Public Welfare*, 80th Cong. 23–25 (1947) [hereinafter *Denham/Murdock/Gray Hearings*]. The issue of possible bias in favor of industry was raised at Gray’s confirmation hearing by Senator Watkins, see *id.* at 35–37, but the primary source of concern about him was, rather, his undistinguished background and almost complete ignorance of the Act. See *id.* at 27 (indicating that when asked about the recent Taft-Hartley amendments to the NLRA, Gray stated that he had “read [the law] twice,” but “I do not yet completely understand it”); JAMES GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 24 (1995) [hereinafter GROSS, *BROKEN PROMISE*] (reporting that three of twelve members of the Senate Labor Committee, “unimpressed with his experience,” voted against Gray). Indeed, some thought that Truman had purposely nominated a man who was “not . . . big enough for the job” in order to thwart effective enforcement of Taft-Hartley. See *id.*

their appointees from government service,²⁷ with the occasional academic thrown in.²⁸

B. *The Tide Begins to Turn: The Eisenhower Board*

The tide began to turn with President Eisenhower's election in 1952. Eisenhower, the first Republican President since the passage of the NLRA,

The only lawyer from the private sector to serve during these years was Donald Wakefield Smith, appointed in 1936. *See* GROSS, MAKING OF THE NLRB, *supra* note 5, at 155 & n.24. Smith apparently practiced immigration law and labor law of an unspecified type. *See id.* Little is known of him except that he was thinly qualified and appointed at the request of a senator to whom he was related by marriage. *Id.*

²⁷ Ten of their fourteen appointees (and hence, ten of the first fourteen NLRB members) came from government. They were: Edwin Smith (1935–41), John Carmody (1935–36), William Leiserson (1939–43), Gerard Reilly (1941–46), John Houston (1943–53), Paul Herzog (1945–53), James Reynolds (1946–51), Abe Murdock (1947–57), Paul Styles (1950–53), and Ivar Peterson (1952–56). *See* NATIONAL LABOR RELATIONS BOARD 60TH ANNIVERSARY COMMITTEE, THE FIRST SIXTY YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD, 1935–1995, at 56 (1995) [hereinafter FIRST SIXTY YEARS] (listing all Board members from 1935 to 1995 and terms of service).

Six of those ten came from other federal or state labor agencies or departments, and one from the NLRB itself. *See* GROSS, MAKING OF THE NLRB, *supra* note 5, at 74–75 (reporting that Smith had been the commissioner of labor and industries in Massachusetts and had also served on the pre-Wagner Act NLRB); *id.* at 154–55 (indicating that Carmody was member of National Mediation Board (NMB)); JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–47, at 89 (1981) [hereinafter GROSS, RESHAPING OF THE NLRB] (indicating that Leiserson was chair of NMB); *id.* at 239–40 (indicating that Reilly was solicitor of Department of Labor); *id.* at 246 (indicating that Herzog had served on state labor board and came to the NLRB from a position as the Navy's liaison to the Board); *id.* at 359–60 n.35 (indicating that Reynolds was Special Advisor to the Secretary of the Navy on labor problems); GROSS, BROKEN PROMISE, *supra* note 26, at 64 (reporting that Styles was Regional Director of Board's Atlanta office). Of the remaining three, two were members of Congress, and the other was a congressional aide. *See* GROSS, RESHAPING OF THE NLRB, *supra*, at 245 (reporting that Houston was a four-term Congressman); GROSS, BROKEN PROMISE, *supra* note 26, at 24 (reporting that Murdock had served four terms in the House and one in the Senate); *id.* at 72 (indicating that Peterson was aide to Senator Wayne Morse).

²⁸ The first chair of the NLRB, Warren Madden, was a professor of property and torts at the University of Pittsburgh. *See* GROSS, MAKING OF THE NLRB, *supra* note 5, at 150. The second, Harry Millis, was an economics professor and arbitrator from the University of Chicago who had also served on the pre-Wagner Act NLRB. *See id.* at 75; GROSS, RESHAPING OF THE NLRB, *supra* note 27, at 226; *see also supra* note 5 (discussing pre-Wagner Act board). In addition, William Leiserson, who came to the NLRB in 1939 from the position of chair of the National Mediation Board, *see supra* note 27, also had a substantial background in academia. *See* J. MICHAEL EISNER, WILLIAM MORRIS LEISERSON 12–14 (1967) (indicating that Leiserson had taught economics at Toledo University for a few years and at Antioch College for several years).

appointed management attorney Guy Farmer as Board chair in 1953.²⁹ Several months later, he selected Albert Beeson, a non-lawyer who had been industrial relations director for two different companies, to fill another open Board seat.³⁰

Despite the fact that Farmer's nomination marked a complete break with the tradition of non-partisan appointments, the issue of his management-side background, and potential bias resulting therefrom, was not even mentioned at his brief confirmation hearing.³¹ The Beeson nomination, however, was another story. Whereas Farmer had sailed through the confirmation process without opposition,³² organized labor weighed in with full force against Beeson, complaining that as a long-time member of management he would be hopelessly biased.³³

²⁹ See *Nomination of Guy Farmer to be a Member of the National Labor Relations Board: Hearing Before the Senate Comm. on Labor and Public Welfare*, 83rd Cong. 1-4 (1953) [hereinafter *Farmer Hearings*]; *FIRST SIXTY YEARS*, *supra* note 27, at 56 (indicating that Farmer had chaired the Board). Farmer had spent the eight years prior to his nomination as a management lawyer at Steptoe & Johnson. See *Farmer Hearings*, *supra*, at 1-2; see also *Nomination of Albert Cummins Beeson to be a Member of the National Labor Relations Board: Hearings before the Senate Comm. on Labor & Public Welfare*, 83rd Cong. 26-27 (1954) [hereinafter *Beeson Hearings*] (indicating that Farmer was the chief labor lawyer for Steptoe & Johnson). Like many a Board member to follow, Farmer had begun his career with the NLRB. See *Farmer Hearings*, *supra*, at 2 (indicating that Farmer had spent seven years with NLRB). The President chooses the Board chair from among the members; no separate confirmation to the position of chair is required. See NLRA § 3(a), 29 U.S.C. § 153(a) (1994).

³⁰ See *Beeson Hearings*, *supra* note 29, at 1 (setting forth Beeson's biography).

³¹ See *Farmer Hearings*, *supra* note 29, at 1-4 (indicating that there were no questions regarding bias in twenty-five minute hearing). Farmer had a distinguished record; he was a former Rhodes Scholar, and during his tenure at the Board had risen to the position of Associate General Counsel, the second highest ranking job in the legal division. *Id.* at 1-2.

³² See 100 CONG. REC. S1985 (1954) (reporting Sen. Kennedy's statement that the committee had quickly and unanimously confirmed Farmer); see also 99 CONG. REC. S8481 (1953) (indicating that Farmer was confirmed without debate, and apparently unanimously).

No union sought to testify against Farmer's nomination or registered any opposition with the Senate Labor Committee, see *Farmer Hearings*, *supra* note 29, and I have found no indication that any union expressed public opposition to Farmer. See also GROSS, *BROKEN PROMISE*, *supra* note 26, at 99 (reporting "little organized opposition" to Farmer appointment).

³³ The CIO (Congress of Industrial Organizations), in the person of Secretary-Treasurer James Carey, offered extensive testimony against Beeson:

The crucial question is whether or not Mr. Beeson, by reason of his years of training and experience representing management, has been rendered incapable of being fair and impartial. . . . In our view, that question must be answered in the affirmative, and his nomination must, therefore, be rejected.

See *Beeson Hearings*, *supra* note 29, at 49. See also *id.* at 55-56 (characterizing Beeson as "a representative of the employer point of view"); *id.* at 51-52 (recounting further testimony of Carey). CIO President Walter Reuther sent a telegram denouncing the administration's "attempt to pack this quasi-judicial Board with representatives of industry." *Id.* at 36.

Testifying before the Senate Labor Committee, CIO official James Carey pointed out that no one from the union side had ever been appointed to the Board,³⁴ and argued that the Republican majority would “consider it an outrage” if the President named someone with experience comparable to Beeson’s on the union side of the table to the NLRB.³⁵ Carey argued that all such partisan appointments should be verboten, and noted that he hardly thought that *he* could be impartial after twenty-one years as a union official.³⁶

Senate Democrats also raised concerns about Beeson’s background,³⁷ and

The AFL (American Federation of Labor) and the Teamsters also registered their opposition. *See* 100 CONG. REC. S1988 (1954). George Meany of the AFL sent a telegram expressing his opposition on the ground that Beeson’s background would result in a pro-management bias. *Id.* Similarly, Teamsters President Dave Beck sent a telegram indicating that his union was opposed to Beeson because Beeson “comes directly from the payroll of management and is clearly employer minded.” *Id.* at S1989. Meany’s telegram of opposition also cited Beeson’s contradictory statements at the hearings, discussed *infra*. *See id.* at S1988; *infra* notes 53–54 and accompanying text.

³⁴ *See Beeson Hearings*, *supra* note 29, at 64 (quoting Carey’s testimony: “When did we ever have any advocates of labor on the National Labor Relations Board? Not in the history of this country.”). As was noted at the hearing, Board member Paul Styles had been a union official early in his career, but had been employed by the Board itself for twelve or thirteen years prior to his appointment. *See id.* at 53–54.

³⁵ *Id.* at 57. Senator Murray concurred in this assessment: “I believe the country would be shocked if we named a man like [Mine Workers President] John L. Lewis, or [CIO President Walter] Reuther, or some other gentleman from the ranks of labor.” *Id.* at 97. In a similar vein, Murray said to Beeson, “[Y]ou have devoted your life to the side of management. Would you recommend [CIO President] Walter Reuther for a place on the board?” *Id.*

³⁶ *Id.* at 57 (“If I [were] asked . . . if I could be a fair-minded member of [the Board] with twenty-one years experience as a national officer of a labor union, my answer must of necessity be ‘No.’”). Beeson had spent nineteen years on the management side. *Id.* at 54. In what was perhaps the rhetorical high point (or low point) of the hearings, Carey went on to state, “I, for one, find it difficult to believe that a man can moult his opinions and his prejudices and emerge in the glistening, new raimant [sic] of a public servant as easily as a caterpillar may transform itself into a butterfly.” *Id.* at 57. To the same effect were the comments of Teamsters President Dave Beck, who stated in a letter to the Senate:

The fundamental question is whether a man whose total professional experience . . . has been as representative of one side of the other . . . can reasonably be expected to adopt an attitude of impartiality when suddenly called upon to administer the national labor law in the interest of no one except the public. I believe that is too much to ask of any man.

I would not ask it of Walter Reuther, [AFL President] George Meany, or John Lewis—I would not want it asked of me.

100 CONG. REC. S1989 (1954).

³⁷ *Beeson Hearings*, *supra* note 29, at 97 (statement of Sen. Murray) (noting that “your whole life has been [spent] on the side of management,” and stating that “we should not . . . put men on the board who have fixed views, and fixed opinions upon these labor questions and expect them to set them aside when called upon to act on controversies”); *see also id.* at 3–4 (questioning by Senator Murray); *id.* at 6 (Sen. Lehman); *id.* at 9–11 (Sen. John Kennedy).

further pointed out that Beeson's *future*, as well as his past, was a potential source of bias. Senator Murray, for instance, argued that anyone who "intends, hopes or expects to be reappointed to his managerial position" after serving on the Board will necessarily be influenced by the fact that "[his] chances of being reemployed by management to represent management may be conditioned on whether or not the decisions he makes have favored . . . management."³⁸

The reason for the Democrats' and organized labor's sudden and rather belated³⁹ concern with the issue of partisan appointments was fairly clear; as

³⁸ *Id.* at 76. Senator Murray's point was tied to Beeson's comment to a reporter that he would be serving a "1-year term" on the Board and would then return to his company. *Id.* at 75; see also *id.* at 119–20 (reporting Senator Lehman's statement that Beeson had a conflict of interest if he planned on returning to his old job). However, the implications of Murray's comment are obviously much broader. See *infra* text accompanying notes 71–74, 159–71 (discussing problem of bias arising from likelihood of future re-employment on the side that the nominee previously represented).

The full term of an NLRB member is five years, but an individual chosen to fill a vacancy is appointed only for the remainder of his predecessor's unexpired term. NLRA § 3(a), 29 U.S.C. § 153(a) (1994). Beeson was appointed to fill out the term of Paul Styles, who had resigned. See GROSS, BROKEN PROMISE, *supra* note 26, at 99.

³⁹ At the Beeson hearings, the senators seemed to either ignore the Farmer appointment completely or to suggest that someone from a non-legal industry-side background would somehow be more biased than a lawyer who had represented management. As to the former, see *Beeson Hearings*, *supra* note 29, at 119 (statement of Sen. Lehman) ("[I]n the entire history of the Board, . . . there has been nobody appointed to the Board who represents labor or industry or whose almost exclusive experience has been in labor or industry."). As to the latter, see *id.* at 11, reporting Senator John Kennedy's comment that:

[E]very other member of the Board has come from a more neutral background . . . than you do. You were a member of management's side of the table, . . . while every other member of the Board has either been a lawyer, who presumably serves either side, or has been a member of a public body which is concerned with representing the public interest in labor-management relations.

Moreover, Senator Kennedy had previously stated that:

In looking over the background of the previous members of the Board, I find that 10 of them are lawyers and 8 of them came from various public bodies . . . concerned with labor-management relations. This is the first time in the history of the Board that a member has been appointed from either labor or management direct. This is a precedent which we should be vitally concerned with, do you not agree?

Id. at 10.

In fact, it could readily be argued that an in-house industrial relations specialist who negotiates contracts and deals with day-to-day problems at the plant is likely to have a more conciliatory attitude toward labor than one whose stock in trade is litigating against unions—i.e., than a management lawyer like Farmer. Indeed, Beeson attempted to make this point, albeit rather obliquely. See *id.* at 3, 5, 11 (setting forth Beeson's attempts to point out that his job required him to consider labor's position as well as management's).

Eisenhower's third appointment to the five-member Board,⁴⁰ Beeson would be in a position to cast the deciding vote on the many hotly contested issues then awaiting Board decision,⁴¹ as well as those arising in the future. In this respect, then, Beeson was an administrative forerunner of Robert Bork, with Farmer playing Antonin Scalia to Beeson's Bork.⁴²

In response to the accusations of bias, Beeson and his supporters raised what were to become the standard arguments in defense of nominees from partisan backgrounds. The first was expertise; they claimed that Beeson's background was an asset rather than a liability because of the insight it gave him into day-to-day labor relations.⁴³ The second was that of personal integrity; Beeson insisted that

⁴⁰ The 1947 Taft-Hartley Act expanded the Board from three to five members. *See supra* note 12.

⁴¹ *See Beeson Hearings, supra* note 29, at 9 (reporting Senator Kennedy's statement that: "As you are going to be the third member appointed by this administration, . . . the balance of power will shift . . . This is of fundamental importance to this committee."); *id.* at 11 (reporting Kennedy's reaffirmation, after questioning Beeson regarding potential bias, that "I think it is of special concern since you will be the third member to go on the Board in the last 12 months. Therefore, we are particularly concerned, as this may change the whole attitude of the Board on some of these questions.") At the time of Beeson's nomination, the Board was made up of two Democratic holdovers appointed by President Truman plus Eisenhower's first two appointees, both Republicans, and was deadlocked on twenty to thirty key cases. *See GROSS, BROKEN PROMISE, supra* note 26, at 100; *see also NLRB: Key to Coming T-H Debate, BUS. WK.*, Jan. 16, 1954, at 162.

By custom, no more than three members of the Board may belong to the same political party. *See Mid-Life Crisis: The NLRB at Fifty*, 1985 Daily Lab. Rep. (BNA) No. 106, at E-1 (June 3, 1985). Thus, the Board, when fully staffed, typically consists of three members from the President's party and two from the opposing party.

⁴² That is, Bork, as the fifth vote to overrule *Roe v. Wade*, underwent intense scrutiny only a year after Scalia, who held very similar views on *Roe* and other issues, had been confirmed without opposition. *See* Gordon J. Humphrey, *Bork, as Seen from Two Angles*, N.Y. TIMES, July 13, 1987, at A-17 (reporting Republican senator's observation that the Senate had confirmed Scalia, who is more conservative than Bork, only a year ago, but that liberals were now claiming "it's different" because Bork would be the decisive vote on issues such as abortion and affirmative action); David A. Kaplan, *Scalia Was 'Worse' Than Bork*, N.Y. TIMES, Oct. 19, 1987, at A-23 (asking "how a majority of Senators opposes [Bork] but not one of them . . . voted against Antonin Scalia's confirmation . . .," and noting that the Senate's "new activism" may be explained by the fact that Bork would have been the swing vote on the Court). Bork, of course, not only underwent intense scrutiny, but was defeated. *See* Linda Greenhouse, *Bork's Nomination is Rejected*, 58-42; *Reagan "Saddened,"* N.Y. TIMES, Oct. 24, 1987, at A-1.

⁴³ *See Beeson Hearings, supra* note 29, at 10 (Beeson testimony):

I think perhaps it is important [to have] someone on the Board with practical, day-to-day plant experience; who knows something . . . of the effect of decisions, on what happens to the employees in a plant and what happens to the plant manager, the ability to get out the work

he could be fair,⁴⁴ and his supporters affirmed their confidence in Beeson's character.⁴⁵ Third was the "two hats" defense;⁴⁶ Beeson's defenders maintained that whatever Beeson's prior role had been, he was certainly capable of discarding that role and assuming the new role of representative of the public interest following his appointment⁴⁷—much, they said, as federal judges are called upon to do.⁴⁸ Fourth and finally was what might be called the necessity

See also 100 CONG. REC. S1975 (1954) (Chairman Smith) (stating that Beeson's hands-on experience "will be of inestimable value to the Board as a whole"); *Beeson Hearings*, *supra* note 29, at 53 (Chairman Smith) (stating that he does not consider Beeson's management-side background problematic because "I think we get benefit by having men who have had experience").

CIO official Carey did not dispute that such experience was valuable, but argued that the bias resulting from Beeson's one-sided background outweighed the benefits of any such expertise:

I would not say that personal knowledge of the day-to-day problems of labor-management relations would not be an asset to a member of the Board. But where that knowledge is obtained as an advocate, and always on the same side, it would go contrary to all our knowledge of human nature to assume that its possessor could cast off the habits of thought which all those years have developed.

Id. at 52.

⁴⁴ See *Beeson Hearings*, *supra* note 29, at 9, 11, 133–34.

⁴⁵ See *id.* at 45 (Chairman Smith) (stating that it is not fair to imply that Beeson will be biased as a result of his background, and that Beeson impressed him as "most frank and candid and . . . as the type of man that ought to be put on this Board"). Smith's comments regarding Beeson's "candor" turned out to be somewhat ironic in light of later developments. See *infra* text accompanying notes 53–54.

⁴⁶ See Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould's Journey from the Academy to the World of Politics*, 47 STAN. L. REV. 749, 759 (1995) (book review). Gottesman and Seidl use the term in reference to the efforts of nominees from academia to distance themselves from their academic writings by asserting that they are capable of differentiating between the roles of academic proponent and judicial agent and of "switching roles at will." The term seems equally apt, however, as applied to those appointed to a quasi-judicial agency from a partisan background.

⁴⁷ See *Beeson Hearings*, *supra* note 29, at 66 (Sen. Griswold) ("I think it is . . . not only possible but very often the case, that men when they accept new roles proceed to live up to those roles and [the] responsibility that is given to them.").

⁴⁸ As evidence that Beeson could readily throw off his prior role once on the Board, Beeson's supporters pointed specifically to the career of Chief Justice Charles Evan Hughes. See *Beeson Hearings*, *supra* note 29, at 66 (Sen. Griswold) (indicating that many senators who had opposed Hughes's appointment on the ground that he could not be fair given his background as an advocate for big business subsequently acknowledged that Hughes had been completely impartial once on the bench); see also 100 CONG. REC. S1974 (1954) (indicating that Chairman Smith offered the same argument). Hughes's nomination as Chief Justice had aroused substantial opposition because of his extensive representation of large corporations, but Hughes had shown great independence once on the Court. *Id.*; see also HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT

defense; Senator Smith, for one, suggested that it would be "exceedingly difficult to find anyone for service on a quasi-judicial board who was entirely free from a background which might allegedly prejudice him."⁴⁹

There was some recognition during the debate over Beeson that the nomination marked a turning point in the conception of the Board itself.⁵⁰ The Minority Report signed by the Labor Committee's six Democrats noted that "[c]entral to an understanding of the controversy surrounding Mr. Beeson's nomination is the nature of the National Labor Relations Board."⁵¹ It pointed out that the Board was not conceived of as a tripartite body in which members were appointed to represent the interests of labor or management, but rather as a quasi-judicial agency, each member of which was supposed to be impartial.⁵²

Midway through the hearings, the focus of the debate shifted. Allegations arose that Beeson had lied in testifying that he had severed all ties with his former company and in denying that he had made certain comments attributed to him by

199 (2d ed. 1985) (describing opposition to Hughes from Midwestern senators concerned about "the erstwhile corporate law specialist's affinity for America's business and financial elite"); *id.* at 196 (describing Hughes as "a Chief Justice with few peers"). Of course, as Senator Lehman pointed out in rebuttal, Hughes had spent the four years prior to his appointment as a public official—as Governor of New York. *See Beeson Hearings, supra* note 29, at 66; *see also* ABRAHAM, *supra*, at 166. More importantly, however, as discussed *infra* text accompanying notes 162–67, the analogy to federal judicial appointments is wholly inapt given that federal judges are appointed for life, whereas Labor Board members are likely to be back in their pre-Board roles within a few years of their appointment.

⁴⁹ *See* 100 CONG. REC. S1974 (1954) (statement of Chairman Smith).

⁵⁰ Teamsters President Dave Beck, for one, stated that the nomination marked "a fork in the road where the NLRB might well be converted into a partisan agency." 100 CONG. REC. S1989 (1954). Of course, it was actually Farmer's nomination that marked the turning point. *See supra* text accompanying notes 29 and 31.

⁵¹ SENATE COMM. ON LABOR AND PUBLIC WELFARE, NOMINATION OF ALBERT C. BEESON TO BE A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, MINORITY VIEWS, S. EXEC. REP. NO. 83-2, at 3 (1954).

⁵² *Id.* at 3–4. This same point was made by a number of individual senators. *See* 100 CONG. REC. S2004 (1954) (statement of Sen. John Kennedy) (pointing out that the Board "is not a tripartite body, to which representatives of labor and management should be appointed," but rather a quasi-judicial body whose members must exhibit strict impartiality); *Beeson Hearings, supra* note 29, at 10 (Sen. Kennedy) (stating that because the Board is a quasi-judicial rather than an arbitral body, it is inappropriate to appoint individuals whose sole identification is with one side or the other); *id.* at 119 (Sen. Lehman) (similar); *id.* at 98 (Sen. Murray) ("[I]t seems to me that the only way we can handle this thing is to have men of entire impartiality on these boards, and I do not think it would look right to have 2 or 3 big labor leaders, and 2 or 3 big labor relations men from the corporations sitting on the Board. . . . I do not see how anyone could approve of that kind of board."); *see also* 100 CONG. REC. S1989 (1954) (letter from Teamsters President Dave Beck to Senate) (expressing belief that Beeson's appointment "would undermine the public character of the NLRB" and is contrary to Congress's intent that NLRB members represent only the public interest).

the press,⁵³ and the Democrats shifted the brunt of their attack to Beeson's veracity and integrity.⁵⁴ At the end of the day, however, Beeson was confirmed; his nomination cleared the Senate Labor Committee on a party-line vote,⁵⁵ and

⁵³ SENATE COMM. ON LABOR AND PUBLIC WELFARE, NOMINATION OF ALBERT C. BEESON TO BE A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, SUPPLEMENTAL MINORITY VIEWS, S. EXEC. REP. NO. 83-2, pt. 2, at 1-3 (1954) [hereinafter SUPPLEMENTAL MINORITY REPORT ON BEESON] (alleging that Beeson had lied in testifying that he had resigned his position and given up his pension rights, and in denying that he had told newspaper that his nomination was for a "1-year term" and that he expected to return to his company upon completion of that term); *see also* 100 CONG. REC. S1976 (1954) (outlining the minority's allegations). The Democrats maintained that Beeson had in fact taken a leave of absence from his company so that he could both retain his pension rights and return to his prior position after serving out his term on the Board. *See* SUPPLEMENTAL MINORITY REPORT ON BEESON, *supra*, at 1-3; *see, e.g.*, 100 CONG. REC. S1990 (1954) (statement of Sen. Hill).

A third issue that received some attention was Beeson's relationship with NLRB chair and fellow Eisenhower appointee Guy Farmer. *See* 100 CONG. REC. S1973 (1954). Farmer had represented Beeson's company on some labor matters, the two men had become good friends in the course of their professional dealings, and Farmer had recommended Beeson's appointment to President Eisenhower. *See* MINORITY REPORT ON BEESON, *supra* note 51, at 5; *see also* *Beeson Hearings*, *supra* note 29, at 27-28. The minority raised the possibility that Beeson might feel a sense of obligation to Farmer or might, especially because he was a non-lawyer, rely excessively on Farmer's judgment in deciding cases. *See* MINORITY REPORT ON BEESON, *supra* note 51, at 6; 100 CONG. REC. S2003 (1954) (statement of Sen. Douglas); *see also* 100 CONG. REC. S2004 (1954) (statement of Sen. Kennedy) (citing Beeson's relationship with Farmer as among the reasons for rejecting nomination).

⁵⁴ *See* 100 CONG. REC. S1978 (1954) (statement of Sen. Morse) ("It is not a question of this man's background, so far as I am concerned"; the problem is Beeson's veracity, integrity, and reliability.); *id.* at S1998 (statement of Sen. Fullbright) ("I have never been impressed by the argument that Mr. Beeson could not be an impartial member of the Board"; opposes nomination rather because he believes that Beeson lied in testimony to committee.).

Neither Senator Morse nor Senator Fullbright, quoted above, was on the Labor Committee. The predominant reason cited by committee members for opposing the nomination was also Beeson's lack of veracity, however. *See id.* at S1989, S1995-96 (statement of Sen. Hill) (opposing nomination because of Beeson's evasiveness and deceit); *id.* at S1994 (statement of Sen. Neely) (accusing Beeson of lying, and stating opposition to nomination on that basis); *id.* at S1981 (statement of Sen. Douglas) (stating that main grounds of minority's opposition are Beeson's contradictory statements, but declining to accede to suggestion that the allegations of bias have been reduced to a "minor detail"); *id.* at S1985 (statement of Sen. Kennedy) (stating that minority "made up our minds" to oppose Beeson only when his lack of candor became apparent); *id.* at S2004 (statement of Sen. Kennedy) (stating that committee minority might under other circumstances overlook the fact that Beeson is the first person appointed directly from the ranks of management or labor and his relationship with Farmer, but that "we cannot overlook the lack of candor and honesty which characterized Mr. Beeson's deceptive and misleading testimony").

⁵⁵ MINORITY REPORT ON BEESON, *supra* note 51, at 3 (indicating that committee vote was 7-6 to report nomination and that all six Democrats opposed nomination).

was approved 45–42 by the full Senate.⁵⁶

Undeterred by the controversy over Beeson's background, the following year President Eisenhower nominated the first ever management lawyer, Theophil Kammholz,⁵⁷ to the even more sensitive position of Board General Counsel.⁵⁸ The Kammholz hearings were in some respects a more muted replay of Beeson's;⁵⁹ many of the same arguments⁶⁰ and counter-arguments⁶¹ regarding

⁵⁶ 100 CONG. REC. S2005 (1954).

⁵⁷ See *Nomination of Theophil Carl Kammholz, of Illinois, to be General Counsel of the National Labor Relations Board: Hearing Before the Senate Comm. on Labor and Public Welfare*, 84th Cong. 1–3 (1955) [hereinafter *Kammholz Hearings*] (indicating that prior to his appointment in 1955, Kammholz had spent nine and a half years with Pope & Ballard and three years with Vedder Price Kaufman & Kammholz, of which he was a founding partner).

⁵⁸ The General Counsel is responsible for the issuance and prosecution of all unfair labor practice complaints, and supervises the Board's regional offices. See 62 NLRB ANN. REP. 3 (1997). The General Counsel's discretion to issue or decline to issue a complaint is completely unreviewable, see *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 114 (1987), and many consider the General Counsel's position the single most important position at the agency. See *Bush Administration Gathers Prospects for Post of Labor Board General Counsel*, 1989 Daily Lab. Rep. (BNA) No. 44, at A-9 (Mar. 8, 1989); *Bitterness of Debate Surrounding NLRB Threatens Functioning of Agency*, *Lubbers Says*, 1984 Daily Lab. Rep. (BNA) No. 43, at A-1 (Mar. 5, 1984).

⁵⁹ This was so even to the extent that allegations of unethical conduct on the nominee's part arose at one point. Union representatives Nicholas DiPietro and Lawrence Gruber testified that they spoke to Kammholz, who was Regional Attorney for the War Labor Board, on a Friday concerning possible improper conduct by a printing company, only to arrive at a related NLRB hearing on the following Monday to find Kammholz there representing that very company on behalf of a law firm. See *Kammholz Hearings*, *supra* note 57, at 21–23. As at the Beeson hearings, the senators who were interested in pursuing these allegations were precisely those who had already expressed concern about Kammholz's management-side background. See *id.* at 40–41 (Sen. Murray) (noting that union witnesses had very clear recollections of meeting with Kammholz and pressing Kammholz for a response); see also *id.* at 26–27 (Sen. Douglas) (questioning union witnesses regarding meeting with Kammholz and sequence of events); *infra* text accompanying notes 60 and 62 (demonstrating that Senators Murray and Douglas, along with Senator Lehman, were the senators most concerned about Kammholz's background).

⁶⁰ See *Kammholz Hearings*, *supra* note 57, at 41–42 (Sen. Murray) (questioning whether former management attorney can either act impartially or give the appearance of impartiality); *id.* at 44 (Sen. Lehman) (expressing concern over the administration's tendency to select men who "may wish to be impartial, but are rendered possibly less than impartial by reason of their continuing affiliations with just one group and interest over a long period of years"); 101 CONG. REC. S2520, S2522 (1955) (views of Senators Douglas and McNamara in opposition to Kammholz nomination) (stating that "hue and cry" would have resulted had any administration nominated someone "fresh from the ranks of labor or labor's legal advocates" to the Board).

⁶¹ Kammholz's defenders raised the "necessity" defense, for instance. See *Kammholz Hearings*, *supra* note 57, at 52 (Sen. Ives) (stating that the General Counsel should be a lawyer and that "it is very difficult to get any lawyer . . . who knows anything about this field, who has

potential bias were raised,⁶² but the opposition to Kammholz appeared rather half-hearted. After hearings in which none of the big guns of organized labor came out against the nomination,⁶³ Kammholz was confirmed by a voice vote.⁶⁴

not represented one side or the other in it"); *id.* at 46 (Sen. Allott) ("If you have to have experience, you have to have it in this field on one side or the other.").

The judicial analogy was also raised, although this time around, the names invoked were Hugo Black and John Harlan. *See id.* at 11 (Sen. Bender) (noting that although many had feared Black would exhibit prejudice against Blacks, he was quite fair-minded during his tenure on the Court); *see also id.* at 45 (Sen. Bender) (similar); 101 CONG. REC. S2523-24 (1955) (statement of Sen. Dirksen) (alluding to a number of federal judges whose backgrounds had raised concern in some quarters but who had quickly become well-respected judges—Justices Hugo Black and John Harlan, a well-known corporate lawyer prior to his appointment, among them). Finally, Senator Dirksen argued that Kammholz's good character was a sufficient buttress against bias. *See* 101 CONG. REC. S2523 (1955).

⁶² The Democrats did make two points or arguments that they had not made during the Beeson hearings. First, they challenged the Republicans' contention that it is impossible to find people with both the requisite expertise and a non-partisan background. *See* 101 CONG. REC. S2522 (1955) (views of Senators McNamara and Douglas in opposition to the nomination) ("We cannot believe that from State labor relations agencies, other offices of the Federal Government, the academic world or arbitration groups, someone with more impartial experience and training than Mr. Kammholz has had could not have been found."); *Kammholz Hearings, supra* note 57, at 44 (Sen. Lehman) ("There must be . . . a great many people in this country who have either had long experience in impartial work, or long experience in public service where they served the public rather than one particular group."); *id.* at 52 (Sen. Murray) (denying the implication that it is necessary to pick people who have worked on one side or the other and pointing, as evidence, to non-partisans he had appointed to the New York State labor relations board during his tenure as governor); *id.* at 15 (Sen. Douglas) ("I can conceive of people with a great deal of practice experience who would still be eligible."); *see also id.* at 19 (Henry Coco, Chicago Allied Trades Council) ("There is no dearth of able men available to fill the position . . . There is no need to place the administration of [the] law in the hands of a one-sided administrator.").

Second, Senators McNamara and Douglas, at least, argued that anyone who had worked on the union or management side should at a minimum have undergone a "decontamination" period in public service or some other neutral capacity prior to being appointed to Board office. *See* 101 CONG. REC. S2522 (1955) ("Service to management or labor is not a disqualification for public office generally. But long-continued advocacy for one side, *without an intervening period of public service*, is a disqualification for General Counsel of the NLRB . . .") (emphasis added); *see also Kammholz Hearings, supra* note 57, at 15-16 (Sen. Douglas) ("I would say that if a person had represented employers or unions, and had then had a period of public service in the field of labor relations before he was appointed, that there would be a decontamination period, so to speak, . . . which could be adjudged to eliminate the possibility of bias.").

⁶³ *See* GROSS, BROKEN PROMISE, *supra* note 26, at 126 ("The anticipated heavy opposition . . . from organized labor never materialized."); 101 CONG. REC. S2520 (1955) (statement of Sen. Smith) (indicating that neither the AFL-CIO nor any of the major unions such as the United Auto Workers or the Steelworkers opposed the Kammholz nomination). Instead, the Chicago Allied Printing Trades Council (Council) was left to carry the ball against Kammholz. *See Kammholz Hearings, supra* note 57, at 16-20 (setting forth testimony of

C. *The Turning Point: The Miller Nomination*

The real turning point in the perceived acceptability of appointing partisans to the NLRB came with the nomination of Edward B. Miller in 1970. In keeping with Democratic tradition,⁶⁵ neither Presidents Kennedy nor Johnson had named any union or management-side representatives to either the Board or the General Counsel's position.⁶⁶ President Nixon's first appointment and his choice for

Council Secretary Henry Coco in opposition to the nomination); *see especially id.* at 18 (complaining that the administration had "single[d] out for this delicate and impartial office not someone recruited from the ranks of available impartial persons, but rather someone recruited from the most deeply partisan ranks"); *id.* at 19 (noting that Kammholz would likely return to management practice, giving rise to problematic "'lure of past and future employment'") (emphasis added) (quoting PAUL H. DOUGLAS, *ETHICS IN GOVERNMENT* 49 (1952)).

⁶⁴ See 101 CONG. REC. S2524 (1955); *N.L.R.B. Aide Approved*, N.Y. TIMES, Mar. 9, 1955, at 30. Moreover, only two Democrats on the Senate Labor Committee ultimately opposed the nomination. 101 CONG. REC. S2520-2522 (1955) (setting forth views of Senators Douglas and McNamara, who oppose Kammholz's nomination because of his management-side background).

⁶⁵ See *supra* notes 26-28 and accompanying text (describing appointees of Presidents Roosevelt and Truman).

⁶⁶ See *infra* text accompanying note 78 (setting forth testimony at the Miller hearings to this effect). In contrast, President Eisenhower made five such appointments. Kammholz's successor as General Counsel, Jerome Fenton, had been in government service for three years at the time of his appointment, but prior to that had spent a dozen years with Pan Am Airways, where he was in charge of labor relations. See *Hearing on Joseph A. Jenkins to be a Member of the National Labor Relations Board, Jerome D. Fenton to be General Counsel of the National Labor Relations Board, Senate Comm. on Labor and Public Welfare*, 85th Cong. 4-5 (1957) [hereinafter *Jenkins/Fenton Hearings*]. Moreover, in addition to Farmer and Beeson, in 1957 Eisenhower had named management attorney Joseph Jenkins to the Board. See *Former NLRB Trial Attorney Is Named to Fill Board Vacancy*, BUS. WK., Feb. 9, 1957, at 169 (indicating that Jenkins had been a partner in a management-side law firm for the last few years); *Jenkins/Fenton Hearings, supra*, at 1-3 (indicating that Jenkins had spent approximately five years in government, including three with the NLRB, before entering management-side practice, and had been a management lawyer for four years prior to his appointment). Neither of these appointments appear to have raised any controversy. See *Jenkins/Fenton Hearings, supra* (indicating that Jenkins and Fenton each received exceedingly brief *pro forma* hearing); GROSS, *BROKEN PROMISE, supra* note 26, at 152 (discussing the Fenton nomination, and giving no indication of any controversy over the appointment). Eisenhower had also, it should be noted, named five individuals from non-partisan backgrounds to the Board. See GROSS, *BROKEN PROMISE, supra* note 26, at 98, 125, 129, 151-52, and 343 n.8 (describing the backgrounds of Philip Ray Rodgers, Boyd Leedom, Stephen Bean, John Fanning, and Arthur Kimball, respectively). Moreover, his third appointee to the General Counsel's position, Stuart Rothman, was a career government employee. See *id.* at 153.

Board chair,⁶⁷ in contrast, was a lawyer who had spent nearly his entire twenty-three year career with a management-side law firm.⁶⁸

The AFL-CIO adamantly opposed Miller's nomination because of his background.⁶⁹ In extensive testimony before the Senate Labor Committee, AFL President George Meany emphasized the importance of the appearance of, as well as actual, impartiality.⁷⁰ Meany also pointed out the "revolving door" problem that arises with such appointments.⁷¹ He expressed concern that Miller—like Farmer and Kammholz before him⁷²—would return to management practice after a quick tour of duty at the Board,⁷³ and that the likely prospect of such a return would only further accentuate the nominee's probable "predisposition to the employer viewpoint."⁷⁴ On top of urging the committee to reject the appointment

⁶⁷ See FIRST SIXTY YEARS, *supra* note 27, at 56 (indicating that Miller served as chair).

⁶⁸ See *Hearings on Nomination of Edward B. Miller, of Illinois, to be a Member of the National Labor Relations Board, Senate Comm. on Labor and Public Welfare*, 91st Cong. 2 (1970) [hereinafter *Miller Hearings*] (indicating that Miller had been associated with management firm of Pope & Ballard since graduating from law school in 1947, with exception of one year spent with Regional Wage Stabilization Board). Theophil Kammholz had worked at this same firm. See *Kammholz Hearings*, *supra* note 57, at 1.

⁶⁹ See *Miller Hearings*, *supra* note 68, at 34–37 (testimony of AFL-CIO President George Meany in opposition to the nomination); see, e.g., *id.* at 34 ("Our sole and simple reason for opposing this nomination is that Mr. Miller, throughout his professional career, has been an employer lawyer."). But see *infra* note 95 (questioning whether organized labor truly opposed Miller).

⁷⁰ *Miller Hearings*, *supra* note 68, at 35.

⁷¹ *Id.* at 36.

⁷² Meany noted that both Farmer and Kammholz had served "abbreviated terms" of two years apiece, and then returned to an "augmented" management-side practice. *Id.* Farmer reportedly turned down reappointment on the ground that he could not get by on a government salary. See GROSS, BROKEN PROMISE, *supra* note 26, at 128. Beeson, too, served an abbreviated term, declining reappointment to a full five-year term at the end of his initial one-year term on the Board. See *id.* at 124.

⁷³ *Miller Hearings*, *supra* note 68, at 36. Miller did not, as it turned out, serve an "abbreviated" term; he served for four and a half years, resigning just ten days before his term officially expired. See FIRST SIXTY YEARS, *supra* note 27, at 56 (setting forth dates of term); 116 CONG. REC. S16548 (1970) (indicating that Miller was appointed to a term that was to expire on December 16, 1974); GROSS, BROKEN PROMISE, *supra* note 26, at 231 (indicating Miller's resignation on December 6, 1974). He did, however, as Meany had projected, certainly parlay his Board service into an "augmented" management-side practice following his term. At the time of his appointment, Miller was "virtually unknown outside the Chicago bar." *Miller Hearings*, *supra* note 68, at 3 (quoting a *New York Times* article). Following his service as Board chair, Miller became, and has remained ever since, one of the most high-profile management lawyers in the country. See, e.g., Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 539 (1994) (referring to "former NLRB Chairman and distinguished management attorney Edward B. Miller").

⁷⁴ *Miller Hearings*, *supra* note 68, at 36.

of Miller or any other partisan advocate,⁷⁵ Meany further recommended that Congress consider banning former Members and General Counsels from practicing before the Board for a substantial period of time after their departure from the agency.⁷⁶

In his testimony, Meany also underlined the historical double standard regarding the appointment of management and union-side representatives to the Board. He noted that organized labor had never sought the appointment of a union-side lawyer or union official to the Board,⁷⁷ and that all twenty-one Board members and the three General Counsels appointed by Democratic Presidents had come from neutral backgrounds.⁷⁸ Republican Presidents, he noted in contrast, had drawn rather freely from the management side; of the Republicans' twelve appointments, five had come directly from a management-side law practice or business position.⁷⁹

Meany argued that partisan appointments should be verboten on both sides, stating that "[w]e believe . . . that no one should be appointed to the Board from the ranks of labor or management, and that includes union lawyers and employer lawyers."⁸⁰ Such appointments, Meany argued, were antithetical to the intended nature of the Board itself:

It would, of course, be both possible and proper to have a tripartite Labor Board, with members designated as representing the public, labor, and management⁸¹ However, the National Labor Relations Board in this country is not set up on that basis. . . . [I]ts members are all supposed to represent the general public, and not the

⁷⁵ *Id.*

⁷⁶ *Id.* (suggesting a period of five years).

⁷⁷ *Id.* at 35–36.

⁷⁸ *Id.* Meany categorized the backgrounds of the twenty-one Board appointees as follows: two members of Congress, three legislative aides to senators, eight "Federal officials" (a category that included career Board employees), two state officials, two law professors, one arbitrator, two lawyers from general private practice, and one appointee from the Navy. *Id.* at 36. The three General Counsels, he noted, had all been career Board employees. *Id.* at 35.

⁷⁹ *Miller Hearings*, *supra* note 68, at 36. Those five were Farmer, Beeson, Kammholz, Board Member Joseph Jenkins, and now Miller. *Id.* at 36. As noted *supra* note 66, Jenkins had been appointed by President Eisenhower in 1957.

Miller attempted to dispute the notion that appointing individuals from a partisan background was an "essentially Republican" phenomenon, but the effort was unconvincing. *See id.* at 24 (pointing to Truman appointee who worked for a union *after* serving on the Board, and to FDR appointee to the *pre*-Wagner Act NLRB, *see supra* note 5, who had represented management clients).

⁸⁰ *Miller Hearings*, *supra* note 68, at 35.

⁸¹ Here, Meany noted that the War Labor Board established during World War II and the Wage Stabilization Board established during the Korean War were both set up in this fashion.

special viewpoints of labor or management.⁸²

In response to Meany's arguments, Miller and his supporters invoked Miller's personal integrity⁸³ and the judicial analogy that had been raised in defense of Beeson and Kammholz.⁸⁴ Miller also laid claim to the related "two hats" defense,⁸⁵ stating:

I think any of us who understand the function of advocacy recognize that in the private sector any of us who are attorneys are in the course of our practice speaking for one side or the other.

I think the man who has some basic sense of fairness and some personal integrity approaches a public position with a totally different point of view. He is no longer an advocate. He is now a decision-maker and there is a substantial difference.⁸⁶

Perhaps most significantly, however, Miller and his defenders—again borrowing from the Beeson playbook,⁸⁷ but refining and amplifying the argument—turned the issue of his background completely around. Hands-on private sector experience, they asserted, yields superior practical expertise.⁸⁸ Since anyone with such experience must come from one side or the other, the argument continued,⁸⁹ Miller's management-side background was not a minus

⁸² *Miller Hearings*, *supra* note 68, at 35.

⁸³ *See id.* at 19, 25 (setting forth Miller's testimony regarding his determination to be fair).

⁸⁴ *See supra* note 48 and accompanying text (discussing the Beeson hearings); *supra* note 61 (discussing the Kammholz hearings). The Supreme Court Justice *de jour* at the Miller hearings was Arthur Goldberg. *See Miller Hearings*, *supra* note 68, at 26 (Sen. Eagleton) (noting that no one had opposed Goldberg's appointment to the Supreme Court on the basis that he had served as general counsel to a union). *See also id.* at 25 (Miller testimony) (stating that the appointment of judges who have had experience in representing one particular segment of society, such as in the criminal law area, is common, and that we do not, as a society, appear to be concerned about such appointments).

⁸⁵ *See supra* notes 46–47 and accompanying text.

⁸⁶ *Miller Hearings*, *supra* note 68, at 19 (Miller testimony).

⁸⁷ *See supra* note 43 and accompanying text.

⁸⁸ *See id.* at 19 (Miller testimony) (stating that his experience representing management "would add some practical knowledge and experience").

⁸⁹ "If you are going to get someone who has had direct practical experience in the field," Miller testified, "he is going to have worked I think, for one side or the other." *Id.* at 25; *see also id.* at 31 (noting that although a few attorneys represent both management and labor, firms generally represent one side or the other); *id.* at 5 (Sen. Percy) (stating that when labor-management experts are selected for key government positions, they necessarily will have worked on either the union or management side).

Ironically, Miller's replacement as NLRB chair—Betty Murphy—had in fact spent most of her career with that admittedly rare bird: a law firm that represents both sides. *See Nomination of Betty Southard Murphy, of Virginia, to Be a Member of the National Labor Relations Board: Hearing before the Senate Comm. on Labor and Public Welfare, 94th Cong.*

but a plus⁹⁰—and the *real* source of concern was not the appointment of management lawyers like Miller, but the prevalence of Board members who came from government rather than from private practice.⁹¹

The Miller appointment marked the Democrats' complete acquiescence to the appointment of management partisans to the Labor Board. The Labor Committee that vetted the Miller nomination—unlike the committee and the Senate that had approved Eisenhower's management-side appointees—was dominated by Democrats,⁹² and numbered among its members such staunch allies of labor as Edward Kennedy and Walter Mondale.⁹³ Nonetheless, the committee's reaction to Meany's forceful testimony and striking historical data was one of profound indifference,⁹⁴ and Miller's nomination did not, so far as it

3, 15–16 (1975) [hereinafter *Murphy Hearings*] (indicating that Murphy had spent fifteen years with a firm that represented several international unions as well as numerous management clients). Murphy had also undergone at least a brief “decontamination” period prior to her appointment; when named to the Board, she had been serving as the Administrator of the Wage & Hour Division of the Department of Labor for a year and a half. *See Murphy Hearings, supra*, at 3, 16.

⁹⁰ *See Miller Hearings, supra* note 68, at 26, 27 (Sen. Eagleton) (stating that he does not think people should be barred from holding office due to prior experience in the field; rather, he thinks that people knowledgeable in their fields should be appointed to specialized agencies, and views Miller's experience as a plus).

⁹¹ *See id.* at 25 (Miller testimony) (“I am concerned, and I think the administration is concerned, that the present Board has had a deficiency by not having anyone on it who has had direct practical experience in the field.”). For a discussion of the relative expertise of ex-management (or union-side) lawyers versus that of NLRB members from government backgrounds, see Joan Flynn, “Expertness for What?”: *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 471–80 (2000). This article acknowledges that ex-management and union lawyers have an edge in practical expertise in certain areas over Board members with no private sector experience, but argues that neither the Board nor the public really reaps the benefit of this expertise because these members' partisan ties will trump their expertise every time. That is, ex-management lawyers, for example, will not draw on their expertise to advance arguments that are contrary to the interests of the management community, nor are they likely to vote for policies disfavored by “their” side regardless of what their expertise tells them about the practical implications, wisdom, or fairness of such policies.

⁹² The Democrats held ten of the seventeen seats on the committee, and a fifty-six to forty-two majority (with two independents) in the Senate. *See Miller Hearings, supra* note 68, at ii (listing members); STEPHEN G. CHRISTIANSON, *FACTS ABOUT THE CONGRESS* 460 (1996).

⁹³ *See Miller Hearings, supra* note 68, at ii (listing members); Aaron Bernstein, *How Business is Winning its War with the NLRB*, BUS. WK., Oct. 27, 1997, at 59 [hereinafter Bernstein, *How Business is Winning Its War with the NLRB*] (describing Kennedy as “labor's point man in the Senate”); Carey W. English, *Why Unions are Running Scared*, U.S. NEWS & WORLD REP., Sept. 10, 1984, at 62 (reporting that Mondale has “long [been] regarded as a sympathetic ally” of labor).

⁹⁴ *See, e.g., Miller Hearings, supra* note 68, at 36 (Chairman Yarborough) (blandly thanking Meany for his “very interesting historical summary”). Senator Pell of Rhode Island

appears, draw a single “no” vote either in committee or on the floor of the Democratic Senate.⁹⁵

D. *The Reagan Board: “The Old Rules are Off”*

Throughout the remainder of the Nixon administration and those of Presidents Ford and Carter, Labor Board appointments followed the pattern first established in the Eisenhower years: Republicans Nixon and Ford drew some but not all of their appointees from the management ranks,⁹⁶ while Democrat Carter did not appoint any union or management-side representatives.⁹⁷

was the only senator to show any interest at all in the bias issue. *See id.* at 24–25 (questioning how someone who has represented only one side could avoid developing sympathy for that viewpoint, and stating that Miller’s background would result in bias no matter how objective he wished to be).

⁹⁵ *See* GROSS, BROKEN PROMISE, *supra* note 26, at 220. On this basis, some concluded that organized labor did not “really” oppose Miller’s nomination, Meany’s testimony notwithstanding. *See id.* (recounting Board Member Frank McCulloch’s statement that: “[Y]ou didn’t hear any votes against [Miller’s] confirmation. If labor had really opposed him, you would have.”). This lack of “true” opposition was attributed to the likely alternatives under the Nixon administration. *See id.* (Gross characterizes Miller as “the least objectionable choice for organized labor of the names put forward for this vacancy”); *Miller Hearings*, *supra* note 68, at 39 (Warren Woods, General Counsel, United Paperworkers Union) (expressing support for Miller, stating, *inter alia*, that he “doubt[s] if we could expect the present administration to submit a better nomination”).

⁹⁶ Nixon’s remaining two Board appointments after Miller, Ralph Kennedy and John (“Doc”) Penello, were both career Board employees. *See* GROSS, BROKEN PROMISE, *supra* note 26, at 221–22. His choice for General Counsel, however, Peter Nash, had spent several years in management-side practice before becoming a Department of Labor official two years prior to his NLRB appointment. *See Peter G. Nash of New York, to be General Counsel of the National Labor Relations Board: Hearing before the Senate Comm. on Labor and Public Welfare*, 92d Cong. 2 (1971) [hereinafter *Nash Hearings*]; *Rosemary Collyer, of Colorado, to be General Counsel, National Labor Relations Board: Hearing before the Senate Comm. on Labor and Human Resources*, 98th Cong. 126 (1984) [hereinafter *Collyer Hearings*] (Nash testimony) (indicating that Nash had spent one year as law clerk to a judge, six years in management-side practice, and two years at the Department of Labor before being appointed General Counsel).

Ford appointed the category-defying Betty Murphy to the Board, *see supra* note 89, followed by management lawyer Peter Walther. *See Nomination of Peter D. Walther to Be a Member of the National Labor Relations Board and John S. Irving, Jr., to be General Counsel of the National Labor Relations Board: Hearing before the Senate Comm. on Labor and Public Welfare*, 94th Cong. 2, 13 (1975) [hereinafter *Walther/Irving Hearings*] (indicating that after beginning career with NLRB, Walther had spent last twelve years representing management at Morgan, Lewis & Bockius).

⁹⁷ Both Carter appointees, John Truesdale and Don Zimmerman, came from government backgrounds. Truesdale had spent the vast majority of his career with the NLRB. *See* GROSS, BROKEN PROMISE, *supra* note 26, at 243, 378 n.5 (reporting that Truesdale had spent all but six years of his career with NLRB, and was Board’s Executive Secretary at time of appointment).

As he did in so many other areas, however, Ronald Reagan broke with mainstream Republican tradition in his NLRB appointments. Whereas his predecessors had appointed management lawyers from well-known law firms⁹⁸—solid members of the labor-management “club”⁹⁹—Reagan went wholly outside the mainstream labor relations community in his early appointments.¹⁰⁰ His first choice for Board chair, John Van de Water, was not a management lawyer at all—but rather a management consultant who specialized in defeating union campaigns.¹⁰¹ Van de Water’s successor as chair also came from well outside the mainstream; Donald Dotson, a corporate labor counsel turned Reagan administration official,¹⁰² was the proverbial fox in the chicken coop¹⁰³—a

Zimmerman had been an aide to Senator Jacob Javits of New York on the Senate Labor and Human Resources Committee. *Id.* at 245.

⁹⁸ As noted previously, Farmer came from Steptoe & Johnson, Miller from Pope & Ballard (currently Pope, Ballard, Shepard & Fowle), Kammholz from Vedder, Price, Kaufman & Kammholz, and Walther from Morgan, Lewis & Bockius—all well-known and well-respected law firms. *See supra* notes 28, 57, 68 and 96.

⁹⁹ *See Moe, Interests, Institutions and Positive Theory, supra* note 24, at 259 (describing norm of “professional” appointments to NLRB, whereby each side is looking for “[a]n experienced attorney who is well known, widely respected and firmly anchored in the labor-management community”—in addition to being partial to that side’s interests).

¹⁰⁰ *See id.* at 267 (noting that Reagan departed from traditional norms by emphasizing ideology and involvement in Reagan campaign and by failing to make serious effort to locate “experienced, well-respected members of the labor bar who also happened to be conservative”).

¹⁰¹ *See Reagan’s NLRB Tips Toward Management, BUS. WK.*, July 6, 1981, at 27–28 (indicating that Van de Water is not a practicing labor lawyer, but rather “advises companies that want to resist union organizing campaigns”). Advising clients on how to defeat a union campaign without overstepping legal limits is of course an important part of a management-side law practice. However, management lawyers also spend considerable time on more constructive matters such as contract negotiation and grievance adjustment—activities that involve dealing with, as opposed to merely attacking or defeating, the union.

¹⁰² Dotson had served as an attorney for Westinghouse, Western Electric, and Wheeling-Pittsburgh Steel before being appointed Assistant Secretary of Labor by President Reagan. *See Dotson Nomination to NLRB Gains Approval of Senate Labor Committee*, 1983 Daily Lab. Rep. (BNA) No. 33, at A-8 (Feb. 16, 1983).

A major study of presidential appointments to both the executive branch and independent agencies classified appointees by both their “career” or “primary occupation,” defined as “the occupations in which they had spent more of their recent working lives than any other,” and their “prior occupation,” or occupations in the period immediately preceding their appointment. *See Linda L. Fisher, Fifty Years of Presidential Appointments, in THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON* (G. Calvin Mackenzie, ed., 1987) (analysis of 1985 study conducted by the National Academy of Public Administration). I place more emphasis on NLRB nominees’ “primary occupation” or “career” as opposed to their prior occupation. That is, Dotson’s background as an in-house labor attorney seems more significant than the fact that he had served in the administration for a year or two prior to his NLRB appointment.

¹⁰³ Dotson was hardly the only such appointee during the early Reagan years. *See Dom Bonafede, The White House Personnel Office from Roosevelt to Reagan* [hereinafter Bonafede,

protege of North Carolina Senator Jesse Helms and a "staunchly antiunion . . . crusader for the Reagan cause."¹⁰⁴ Finally, Robert Hunter, another of Reagan's initial appointments, was an aide to another arch-conservative senator¹⁰⁵ and "labor bugbear,"¹⁰⁶ Utah's Orrin Hatch,¹⁰⁷ and had ties to the Heritage Foundation,¹⁰⁸ Reagan's favorite think tank.¹⁰⁹

The White House Personnel Office], in *THE IN-AND-OUTERS*, *supra* note 102, at 30, 50 (listing "several [Reagan appointees] whose backgrounds and philosophy were inimical to their agency's mission," including Anne Gorsuch, head of the Environmental Protection Agency, who as a state legislator had been a frequent critic of the EPA and had opposed legislation to control toxic waste and to impose auto emission standards); *see also* Robert Shogan, *The Confirmation Wars: How Politicians, Interest Groups, and the Press Shape the Presidential Appointment Process*, in *OBSTACLE COURSE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE PRESIDENTIAL APPOINTMENT PROCESS* 87, 122–23 (1996) (describing how after first attempting to abolish the Legal Services Corporation, Reagan attempted to nominate three members to its board who appeared dedicated to restricting the corporation's activities).

¹⁰⁴ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 268; *see also infra* note 191 (characterizing Dotson as "legendary" for his conservatism and elaborating on his anti-union attitude). Especially in his first term, Reagan attached great importance to the ideological purity of his appointees generally. *See* Bonafede, *The White House Personnel Office*, *supra* note 103, at 48; Fisher, *supra* note 102, at 13; James P. Pfiffner, *Nine Enemies and One Ingrate: Political Appointments during Presidential Transitions* 60, 72–73, in *THE IN-AND-OUTERS*, *supra* note 102 (noting the heavy emphasis placed on appointees' loyalty to President and ideological values).

¹⁰⁵ *See* Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 294 (1999) (referring to Hatch as "[o]ne of the Senate's most conservative members"). As of 1999, Hatch had a lifetime American Conservative Union rating of ninety-two. *Id.* at 294 n.143. Senator Strom Thurmond of South Carolina, in comparison, had a rating of ninety. *Id.*

¹⁰⁶ Bill Saporito, *Unions Fight the Corporate Sell-Off*, FORTUNE, July 11, 1983, at 145 (characterizing Hatch as such in a discussion of the Hunter appointment).

¹⁰⁷ *See* Robert P. Hunter, *of Virginia, to be a Member of the National Labor Relations Board: Hearing before the Senate Comm. on Labor and Human Resources*, 97th Cong. 1 (1981) [hereinafter *Hunter Hearings*].

¹⁰⁸ Hunter produced the chapter on labor issues for the Heritage book *MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION* (C. Heatherly ed. 1981). *See Hunter Hearings*, *supra* note 107, at 453; GROSS, *BROKEN PROMISE*, *supra* note 26, at 247–48. Although the book clearly identified him as the author of the chapter, Hunter attempted to distance himself from its recommendations at his confirmation hearing, claiming that he had only "coordinated" the project. *See Hunter Hearings*, *supra* note 107, at 6–7, 9–12; *see id.* at 10–11 (setting forth Hunter's testimony that he did not write the chapter and "was not aware" of its recommendation that section 14(b) of the Act, which permits union-security agreements in states that do not choose to outlaw them, be repealed). Ironically, Hunter's chapter criticized the prevalence of "government bureaucrats" on the Carter Board and recommended that only those with substantial private sector collective bargaining experience be appointed to the NLRB. *See MANDATE FOR LEADERSHIP*, *supra*, at 494. Hunter himself had little or no such experience. *See Hunter Hearings*, *supra* note 107, at 20 (Hunter resume)

The appointment of Van de Water—creator of numerous “how-to-defeat-the-union” pamphlets¹¹⁰ and videos¹¹¹ and proud victor in 125 of 130 anti-union campaigns¹¹²—drew vociferous union opposition,¹¹³ and after a hearing in which the usual arguments regarding bias were made¹¹⁴ and the standard defenses

(indicating that Hunter had spent all but seven months of fifteen-year legal career in government).

¹⁰⁹ See GROSS, BROKEN PROMISE, *supra* note 26, at 248 (characterizing Heritage Foundation as such).

¹¹⁰ See, e.g., *Nomination of John R. Van de Water of California to be Chairman of the National Labor Relations Board: Hearings of the Senate Comm. on Labor and Human Resources*, 97th Cong. 83 (1981) [hereinafter *Van de Water Hearings*] (containing Van de Water—designed letter to employees that raises the specter that unionization will lead to “an epidemic of bombings and sabotage,” citing a recent strike that, according to the letter, “resulted in murder, house burnings, [and] brutal beatings by imported ‘goon squads’”).

¹¹¹ See *Reagan’s NLRB Tips Toward Management*, *supra* note 101, at 28.

¹¹² See *Van de Water Hearings*, *supra* note 110, at 56 (containing copy of a Van de Water speech touting his record).

¹¹³ See *id.* at 69–71 (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO) (arguing that the appointment of a management consultant who had devoted a substantial part of his career to putting together anti-union campaigns was even more objectionable than the appointment of management-side lawyers, which the AFL-CIO also opposes).

¹¹⁴ Testifying in opposition to the nomination, AFL-CIO Secretary-Treasurer Thomas Donahue reiterated the AFL’s position that no one should be appointed to the Board from the ranks of either management or labor. *Van de Water Hearings*, *supra* note 110, at 68, 79. He also repeated George Meany’s earlier complaints about the historical double standard. See *supra* text accompanying notes 77–79 (recounting Meany testimony at Miller hearings). That is, he noted that while the union side had never pressed for the appointment of a union lawyer or official to the Board and none had been appointed, a number of management lawyers had been appointed to the Board or to the General Counsel’s position. *Van de Water Hearings*, *supra* note 110, at 69. Appointing a management consultant was even worse, Donahue stated, and he queried rhetorically whether the management community and the public would acquiesce in the appointment of the AFL’s director of organizing to the position of Board chair. *Id.* at 70.

Donahue also pointed to the problem of the “lure of . . . future employment,” see *supra* note 63, noting that for former Board Chair Edward Miller, Member Peter Walther and General Counsel Peter Nash, Board service had been but a brief hiatus in their careers as management attorneys. See *Van de Water Hearings*, *supra* note 110, at 69 (citing them as “men who have interrupted careers as employer lawyers for a short stint at the NLRB”); see also FIRST SIXTY YEARS, *supra* note 27, at 56–57 (indicating that Miller and Nash served terms of approximately four years before returning to private practice, while Walther served less than two years). Finally, Donahue argued that the appointment of individuals from a partisan background to the Board transformed the agency into something it was not intended to be: a tripartite board in which most members represent either labor or management rather than the public interest as a whole. *Van de Water Hearings*, *supra* note 110, at 79 (“You should not make of the Board . . . a group in which the Chairman or some member of it, becomes a swing member, by putting two union advocates and two company advocates on it.”); see also *supra* note 38 and accompanying text (indicating that the same point was raised at the Beeson hearings).

invoked,¹¹⁵ the nomination was actually blocked,¹¹⁶ although Van de Water served for a year and a half as a recess appointee.¹¹⁷ The refusal to confirm Van de Water, however, hardly signaled a senatorial sea change in attitude regarding the propriety of management representatives serving as NLRB members. Dotson sailed through the nomination process with ease,¹¹⁸ as did Patricia Diaz Dennis, another in-house management lawyer¹¹⁹ appointed by Reagan.¹²⁰

Donahue did point to one additional problem with the appointment of partisans that had not hitherto been raised: the phenomenon of former Board Members and General Counsels "trading on their Board credentials" in lobbying Congress on behalf of positions favored by their management clients. *See id.* at 69 ("The spectacle [of] Mr. Miller and Mr. Nash trading on their Board credentials as they lobbied on behalf of their management clients against the labor law reform bill [of 1977-78] is perhaps the clearest example of how this practice of using Board appointments to further management's private advantage undermines the Board's integrity:").

¹¹⁵ The defense was led by Senator Hatch, Chair of the Labor Committee. Hatch first invoked the nominee's personal integrity, citing Van de Water's testimony that he would be objective and unbiased. *See Van de Water Hearings, supra* note 110, at 78, 80. Second, he attempted to convert Van de Water's background into a plus rather than a minus. *See id.* at 80 ("maybe . . . what is wrong with the Board [is] [t]hey do not have people who really have been in the frey [sic]"). Third and finally, he invoked the judicial analogy. *Id.* ("I am not so sure that because a man has been a management lawyer or a union lawyer . . . he or she should be foreclosed from being on the Board. I would hate to think that we would apply that in judicial nominations . . .").

¹¹⁶ By a tie vote, the Senate Labor Committee failed to approve the nomination. *See GROSS, BROKEN PROMISE, supra* note 26, at 249. President Reagan resubmitted the nomination during the next Congressional session, but additional opposition then emerged from an unexpected quarter—the National Right to Work Committee—and the nomination was never approved. *See id.* at 250; *see also Right to Work Committee Asks President to Withdraw Van de Water Nomination to NLRB*, 1982 Daily Lab. Rep. (BNA) No. 170, at A-3 (Sept. 1, 1982).

¹¹⁷ *See GROSS, BROKEN PROMISE, supra* note 26, at 249-50. President Reagan had given Van de Water a recess appointment in August 1981, a month before his confirmation hearings. *See id.* at 249. Officials appointed during a Congressional recess are permitted to serve without Senate approval until the end of the legislative session following that recess. *See Michael A. Carrier, Note, When is the Senate in Recess for Purposes of the Recess Appointment Clause?*, 92 MICH. L. REV. 2204, 2205 (1994).

¹¹⁸ *See Dotson Nomination to NLRB Gains Approval of Senate Labor Committee, supra* note 102 (reporting that the Senate Labor Committee approved nomination by 15-1); *Senate Confirms Nomination of Donald Dotson to Head NLRB*, 1983 Daily Lab. Rep. (BNA) No. 34, at A-5 (Feb. 17, 1983) (reporting that Dotson was confirmed by the Senate without objection).

¹¹⁹ After three years at a law firm, Dennis had spent the seven years prior to her appointment as in-house labor counsel with the Pacific Lighting Company and then the American Broadcasting Company. *See Nomination of Edward A. Knapp, of New Mexico, to be Director, National Science Foundation, and Patricia Diaz Dennis, of California, to Be a Member of the National Labor Relations Board, Senate Comm. on Labor and Human Resources*, 98th Cong. 32 (1983) [hereinafter *Dennis Hearings*]; *see also Hatch and Kennedy Agree to Poll Committee on Nomination of Patricia Dennis to NLRB*, 1983 Daily Lab. Rep. (BNA) No. 72, at A-9 (Apr. 13, 1983).

While organized labor apparently viewed it as futile to attempt to block the Dotson,¹²¹ Dennis, and Hunter nominations,¹²² these appointments so piqued the AFL-CIO as to move it to forswear its traditional refusal to seek the appointment of union-side officials or attorneys to the Board. In a letter to Senator Hatch, chair of the Senate Labor Committee, AFL President Lane Kirkland complained of the nomination of "three individuals whose appointment is owing to their having been good and faithful agents of management, and to no other cause,"¹²³ and declared that in view of such partisan appointments, the old rules were off:

¹²⁰ See *Hatch and Kennedy Agree to Poll Committee on Nomination of Patricia Dennis to NLRB*, *supra* note 119 (reporting that Dennis nomination had received "joint praise" of Senators Hatch and Kennedy and appears headed for routine confirmation); *Former Right-to-Work Foundation Attorney Named Legal Advisor to Five-Member NLRB*, 1983 Daily Lab. Rep. (BNA) No. 79, at A-3 (Apr. 22, 1983) (noting Dennis's confirmation).

¹²¹ The AFL-CIO had initially planned an all-out campaign against the Dotson nomination, see *Senate Confirms Nomination of Donald Dotson to Head NLRB*, *supra* note 118, but ultimately backed down. See *Dotson Nomination to NLRB Gains Approval of Senate Labor Committee*, *supra* note 102 (reporting that AFL President Lane Kirkland had declined the opportunity to testify before the Senate Labor Committee, stating that the AFL had "grave reservations as to Mr. Dotson's fitness," but had decided that it lacked "sufficient documentation 'to meet our standards for actively opposing a nominee'"). Dotson had two factors running strongly in his favor. First, he had earlier been confirmed by the very same senators to a Department of Labor position. See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 268-69 (noting that Dotson was "eminently confirmable" given earlier confirmation to less sensitive position). Second, organized labor had used up a great deal of its political capital in fighting Van de Water's nomination, and "had little left with which to fight [Dotson]." *Id.* Ironically, while Van de Water did not compile a notably conservative record for a Republican appointee, Dotson remains legendary for his lopsidedly pro-employer voting record. See Harry Bernstein, *Overtime Differences May Snag New Wage Plan*, L.A. TIMES, Mar. 20, 1985, at pt. 4, p. 1 (observing that labor's "successful effort to block . . . Van de Water, a moderate management-oriented attorney, [backfired]; [t]hey got the far more conservative Dotson instead."); Saporito, *supra* note 106 (noting that given Dotson's record as Board chair, "some in labor's quarter are now pining for Van de Water"); *The Voting Records of the Members of the NLRB*, EMPLOYMENT LAW ALERT (Nixon Hargrave Devans & Doyle LLP) Jan. 1999 [hereinafter January 1999 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*) (referring to "the legendary Donald Dotson" and noting that Dotson voted for union position in only 6 of 218 disputed cases).

¹²² In addition to his conservative ideology, Hunter had earned labor's enmity as coordinator of the successful filibuster against Democratic-sponsored labor law reform in 1977-78. See GROSS, BROKEN PROMISE, *supra* note 26, at 247; *Letter from AFL-CIO President Kirkland to Sen. Hatch (R-Utah)*, 1983 Daily Lab. Rep. (BNA) No. 22, at E-1 (Feb. 1, 1983). Given the "old-boy" network in the Senate, however, Hunter had a huge leg up on the nomination process; he had worked for the Senate Labor Committee, which oversees Labor Board nominations, for the eight years preceding his appointment. See *Hunter Hearings*, *supra* note 107, at 1 (indicating that Hunter had spent the last four years as labor counsel to Senator Hatch, most recently as chief counsel to the committee, and for four years before that had been counsel to committee member Robert Taft).

¹²³ See *Letter from AFL-CIO President Kirkland to Sen. Hatch (R-Utah)*, *supra* note 122.

In the past . . . we sought [the] appointment of individuals who . . . had not been the agents of management or labor. It has been our considered position that this degree of forbearance is necessary in the interest of assuring both justice and the appearance of justice in a highly adversary field. . . .

These nominations . . . are the final evidence that . . . there will be no reciprocal restraint. I wish, therefore, to state that as a matter of practical self-protection we hereby renounce our prior position in this regard. Like our management counterparts, we will no longer bind ourselves with any limitations and we will act on the premise of this Administration—that appointees to the Board need not have a significant record in the field but only need be ideological supporters of the tendency in power.¹²⁴

Kirkland reiterated this position in a press conference a few months later, stating that:

For the first time, appointments to the NLRB have been of a character that represents the perversion of that board into an instrument of anti-union employers. And I think that serves notice [that] all the old rules are off . . . I would regard us as privileged to follow the same practice and to put forth partisans of that temper, if we again come into a position where we might be able to have some persuasive influence over an Administration such as these rightwing businessmen seem to have with this Administration.¹²⁵

President Reagan did not appear to be terribly cowed by the prospect of future retaliation on the part of the AFL.¹²⁶ To the contrary, his next choice for high Board office, Rosemary Collyer as General Counsel, was, like Diaz Dennis,¹²⁷ a young and relatively inexperienced (and unknown) management lawyer,¹²⁸ as were two of his remaining Board appointees,¹²⁹ Marshall Babson¹³⁰

¹²⁴ *Id.*

¹²⁵ *House Subcommittee Plans Oversight Hearing on Changes at Enforcement Division of NLRB*, 1983 Daily Lab. Rep. (BNA) No. 110, at A-10 (June 7, 1983).

¹²⁶ It is true that the "Reagan Board II" appointees were not as conservative as their predecessors. See PAUL WEILER, *GOVERNING THE WORKPLACE* 24 (1990). However, as explained *infra* in text, President Reagan certainly did not hesitate to continue to appoint management lawyers to the Board and General Counsel's position following the AFL's threats of retribution.

¹²⁷ Diaz Dennis was only thirty-six, and ten years out of law school, at the time of her appointment. See *Dennis Hearings*, *supra* note 119, at 31; see also *Mid-Life Crisis: The NLRB at Fifty*, *supra* note 41, at E-2 (setting forth union lawyers' criticism of Dennis as a "relatively inexperienced labor attorney").

¹²⁸ Collyer was only seven years out of law school at the time of her appointment, and had spent only four and a half years working partially on NLRA matters for a management-side law firm before being appointed chair of the Federal Mine Safety and Health Review Commission in 1981. See *White House Search for NLRB General Counsel Centers on Mine Safety Commission Chairman*, 1984 Daily Lab. Rep. (BNA) No. 13, at A-9 (Jan. 20, 1984). Female presidential appointees have long been younger, on average, than their male counterparts. See

and Mary Miller Cracraft.¹³¹ The AFL¹³² and its Democratic allies¹³³ mounted a vigorous anti-Collyer campaign and were able to block her confirmation for

Fisher, *supra* note 102, at 7 (noting that from 1964 to 1984, median age of female appointees was forty-one, compared to forty-seven for males).

¹²⁹ Reagan also appointed two Board members who came from government backgrounds. See *infra* note 130.

¹³⁰ The thirty-nine-year-old Babson had had ten years' experience as a lawyer, all of it, it appears, practicing management-side labor law. See *White House Names Johansen and Babson to Fill Two Vacancies at Labor Board*, 1985 Daily Lab. Rep. (BNA) No. 48, at A-6 (Mar. 12, 1985); see also *Statement of NLRB Nominees Johansen and Babson Before Senate Labor and Human Resources Committee, May 8, 1985*, 1985 Daily Lab. Rep. (BNA) No. 90, at F-1 (May 9, 1985) [hereinafter *Babson and Johansen Statements*].

Babson's nomination was paired with that of a career Board employee, Wilford ("Bud") Johansen. *White House Names Johansen and Babson to Fill Two Vacancies at Labor Board*, *supra* (reporting that Johansen has been with Board for twenty-six years and is head of Board's Los Angeles office). In between the Babson-Johansen appointments and the Cracraft nomination, President Reagan appointed James Stephens, counsel to Senator Hatch's Senate Committee on Labor and Human Resources, to the Board. See *Stephens and Semerad Confirmed by Senate in Routine Proceeding*, 1985 Daily Lab. Rep. (BNA) No. 202, at A-5 (Oct. 18, 1985).

¹³¹ Cracraft, like Babson, was only thirty-nine at the time of her nomination, and had been a practicing lawyer for only a decade. See *White House Selects Mary Cracraft to Serve Term of Five Years on NLRB*, 1986 Daily Lab. Rep. (BNA) No. 138, at A-9 (July 18, 1986). After four years at an NLRB regional office, she had practiced management-side labor law for five years. See *id.*; *White House Reappoints Cracraft to Five-Year Term on Labor Board*, 1991 Daily Lab. Rep. (BNA) No. 142, at A-5 (July 24, 1991). Like Rosemary Collyer, Cracraft was not even a partner at her law firm at the time of her appointment. See *White House Selects Mary Cracraft to Serve Term of Five Years on NLRB*, *supra* (indicating that Cracraft is an associate at the firm). Cracraft was, however, well-connected politically; although a registered Democrat, she was a supporter of, and well-known to, Republican Senator Kit Bond, a partner at her law firm. See *Newest NLRB Member Says She Plans to Approach Cases as More than Just Transcripts and Briefs*, 1986 Daily Lab. Rep. (BNA) No. 248, at A-2 (Dec. 29, 1986).

¹³² See, e.g., *Vote on NLRB General Counsel Nominee Delayed Amid Increasing Labor Opposition to Collyer*, 1984 Daily Lab. Rep. (BNA) No. 91, at A-5, A-6 (May 10, 1984) (reporting AFL President Lane Kirkland's comment that Collyer "has 'no visible qualifications in the field of labor law,'" and lament of AFL's Executive Council regarding the appointment of "yet another employer lawyer" to high Board office, and further reporting Council's assertion that Collyer possessed the same "single-minded attention to the needs and desires of employers" as Reagan's appointments to the Board and differed from those appointees only in that she "is far less experienced and expert"); *Collyer Hearings*, *supra* note 96, at 126 (setting forth statement of AFL-CIO's Thomas Donahue in opposition to Collyer nomination and indicating that AFL objected to Collyer based on her lack of experience in labor-management relations, the fact that what little experience she had was all on the employer side, and her pro-employer voting record as chair of the Mine Safety Commission).

¹³³ See *Senate Labor [sic] Fails to Act on Collyer or Civil Rights Bill*, 1984 Daily Lab. Rep. (BNA) No. 127, at A-4 (July 2, 1984) (reporting that both committee Democrats and organized labor opposed the nomination on the ground that Collyer lacked the requisite experience and because of her alleged pro-employer bias).

almost a year,¹³⁴ but even this temporary success was made possible only by Collyer's unprecedentedly thin qualifications for the critically important General Counsel's position.¹³⁵ By the time of the Babson and Cracraft nominations organized labor seemed to recognize that it was fighting a losing battle in opposing Board appointees based on their management-side backgrounds; it raised only a *pro forma* objection to Babson's nomination,¹³⁶ and apparently chose not to oppose Cracraft at all.¹³⁷

¹³⁴ The appointment was held up in committee for some months, at which point President Reagan granted Collyer a recess appointment. See *AFL-CIO Will Oppose Collyer Nomination as Board Counsel*, 1984 Daily Lab. Rep. (BNA) No. 90, at A-13 (May 9, 1984) (reporting that Collyer was nominated on April 5, 1984); *Collyer Named NLRB Counsel*, CONG. Q., Oct. 20, 1984, at 2761 (reporting that with the nomination still bottled up in committee by Democrats, President had granted Collyer recess appointment). Some months later the AFL reluctantly gave up its attempt to block the nomination, and Collyer's nomination to a full term was then approved with little difficulty—almost exactly one year after she had been nominated. *Senate Approves Collyer Nomination for NLRB General Counsel by Voice Vote*, 1985 Daily Lab. Rep. (BNA) No. 66, at A-12 (Apr. 5, 1985) (reporting that after the AFL informed the Senate Labor Committee that it would no longer attempt to block Collyer despite its continued opposition to her appointment, the nomination was approved 15–1 by the committee, and by voice vote in the Senate).

¹³⁵ At the hearings, Collyer's lack of experience was the primary focus of the Democrats. See *Collyer Hearings*, *supra* note 96, at 27–29, 34–36, 132–37 (indicating that Collyer was subjected to aggressive questioning regarding her degree of experience with NLRA issues). Collyer, as noted *supra* note 128, had been in practice for only four and a half years before being appointed to the Mine Safety Commission, and there was some question as to the proportion of time that she had spent on NLRA matters as opposed to other labor issues. *Collyer Hearings*, *supra* note 96, at 27–29. In contrast, outgoing General Counsel William Lubbers had had twenty-seven years' experience with the NLRB before assuming that position; his predecessor, John Irving, ten years of prior NLRB experience; and Arnold Ordman, General Counsel from 1963 to 1971, seventeen years of prior Board experience. See *Statement of Rep. Barney Frank Before Senate Labor and Human Resources Committee on Nomination of Rosemary Collyer as NLRB General Counsel*, 1984 Daily Lab. Rep. (BNA) No. 101, at D-1 (May 24, 1984). Even Pete Nash, who was only thirty-four when appointed General Counsel, had considerably more labor law experience than Collyer before assuming the position. See *Collyer Hearings*, *supra* note 96, at 151 (Nash testimony) (testifying that he had spent six years as management-side labor lawyer and had then served first as Associate Solicitor and then as Solicitor of Department of Labor for total of two years before being appointed General Counsel at age thirty-four); see also *Nash Hearings*, *supra* note 96, at 2 (indicating that Nash had taught labor law at college level for a number of years prior to appointment). As noted previously, the General Counsel's position is often regarded as the single most important post at the agency. See *supra* note 58.

¹³⁶ The AFL elected not to testify against Babson. See *Senate Labor Committee Holds Hearing on Nominations of Johansen and Babson*, 1985 Daily Lab. Rep. (BNA) No. 90, at A-12 (May 9, 1985). Instead, it simply filed a letter of opposition with the committee reiterating its long-held position that neither management nor union advocates or representatives should be appointed to the Board, but acknowledging that both the committee and the full Senate had on several recent occasions rejected that position and confirmed management attorneys for Board

E. *The Bush and Clinton Years: The Routinization and Acceleration of Partisan Appointments*

The trend toward the routinization of the appointment of management lawyers by Republican administrations continued during the Bush years. President Bush's appointments to the Board included two more management attorneys,¹³⁸ Clifford Oviatt¹³⁹ and John Raudabaugh,¹⁴⁰ and his choice for General Counsel, Jerry Hunter, also had a substantial management-side background.¹⁴¹ By now apparently accepting total defeat on the issue of the

positions. See *Senate Labor Committee Clears Nominations of Johansen and Babson to Vacant NLRB Seats*, 1985 Daily Lab. Rep. (BNA) No. 100, at A-11 (May 23, 1985). Babson was confirmed in a routine fashion. See *id.* (reporting that Babson and Johansen nominations were approved by telephone poll of Senate Labor Committee); *Senate Approves Johansen, Babson Nominations by Routine Voice Vote*, 1985 Daily Lab. Rep. (BNA) No. 102, at A-3 (May 28, 1985) (reporting approval of nominations by voice vote in the full Senate).

¹³⁷ The *BNA Daily Labor Report*, which reports extensively on all NLRB nominations, contains no mention of the AFL's position on Cracraft, and the nomination sailed through the Senate. See 132 CONG. REC. S17333, S17382 (1986) (reporting unanimous approval of nomination by both the Senate Labor Committee and the full Senate).

¹³⁸ Bush also drew two appointees from government backgrounds; he reappointed former Hatch aide James Stephens to a second term, and also appointed Dennis Devaney, who had served as General Counsel to the Federal Labor Relations Authority and as a member of the Merit Systems Protection Board. See *President Taps Raudabaugh for NLRB Seat; Chairman Stephens Nominated for Second Term*, 1990 Daily Lab. Rep. (BNA) No. 121, at A-17 (June 22, 1990) (Stephens); *Senate Labor Panel Clears NLRB, DOL Nominees, Approves Increased Pension and OSHA Penalties*, 1989 Daily Lab. Rep. (BNA) No. 192, at A-5 (Oct. 5, 1989) [hereinafter *Senate Labor Panel Clears NLRB Nominees*] (Devaney).

¹³⁹ Oviatt was a partner with the management-side firm of McGuire, Woods, Battle & Boothe, and had spent his entire career in private practice. See *Bush Names Oviatt and Rodgers to Fill Two Vacancies at NLRB*, 1989 Daily Lab. Rep. (BNA) No. 139, at A-7 (July 21, 1989); see also *Senate Labor Panel Clears NLRB Nominees*, *supra* note 138.

¹⁴⁰ See *President Taps Raudabaugh for NLRB Seat; Chairman Stephens Nominated for Second Term*, *supra* note 138 (noting that Raudabaugh is a partner with the management firm of Constangy, Brooks & Smith).

¹⁴¹ Hunter had done a five-year stint as in-house labor counsel at a hard-line corporation in between two stretches in government. See *Jerry M. Hunter of Missouri Nominated to be General Counsel of Labor Board*, 1989 Daily Lab. Rep. (BNA) No. 93, at A-1 (May 16, 1989) (reporting that Hunter began his career with two-year stints at both the Equal Employment Opportunity Commission (EEOC) and the NLRB, served as labor counsel for the Kellwood Company for five years, and at the time of his appointment had been director of the Missouri State Department of Labor and Industrial Relations for three years). When Hunter had been under consideration for a Board seat while working at the Kellwood Corporation, there were objections from the labor side based on what some called the company's "pre-Louis XIV" labor relations. See *Reagan Administration Continues Search for Replacement to Fill Jenkins Seat at NLRB*, 1983 Daily Lab. Rep. (BNA) No. 233, at A-8 (Dec. 2, 1983) (noting union officials' comments that the company has a collective bargaining agreement at only one of its plants, which is slated to close down, and that organizing efforts at other plants are resisted vigorously).

propriety of appointing management representatives to the Board or General Counsel's position, the AFL did not oppose any of these nominations.¹⁴²

Perhaps the most notable aspect of the Bush years, however, was that President Bush was the first President to at least attempt to appoint an individual with a substantial union-side background to the Board. Bush nominated Donald Rodgers, a Labor Department official who had spent over twenty years with the Operating Engineers and the Teamsters in addition to serving in three different Republican administrations.¹⁴³ Rodgers's appointment was opposed by the National Right to Work Committee,¹⁴⁴ but appeared headed for approval¹⁴⁵ until

¹⁴² See *Bush Administration Expected to Name Diane Burkley to Seat on Labor Board*, 1989 Daily Lab. Rep. (BNA) No. 81, at A-9 to A-10 (Apr. 28, 1989) (reporting that neither Hunter nor Oviatt drew strong negative reactions from organized labor); see also *Senate Confirms New Heads of OSHA and MSHA; Late Vote on Two DOL, Four NLRB Posts Possible*, 1989 Daily Lab. Rep. (BNA) No. 194, at A-4 (Oct. 10, 1989) (reporting that NLRB appointees including Oviatt and Hunter were approved in a voice vote by the Senate Labor Committee, and giving no indication of opposition to the appointments); *Senate Approves Nominees to NLRB, NMB, Inspector General at Labor*, 1990 Daily Lab. Rep. (BNA) No. 152, at A-7 (Aug. 7, 1990) (reporting that Oviatt and Raudabaugh, among others, had been confirmed, and reporting no opposition to either of these nominations).

¹⁴³ See *Bush Names Oviatt and Rodgers to Fill Two Vacancies at NLRB*, *supra* note 139. Rodgers had worked for the International Union of Operating Engineers from 1952 until becoming a White House aide and later a Department of Labor official during the Nixon administration. *Id.* He next worked as a Teamsters lobbyist for seven years, then returned to government during the Reagan administration, serving in several White House and Department of Labor posts. *Id.*

The Rodgers appointment was also notable in that Rodgers was the first non-lawyer nominated since the mid-1960s. See *id.* (reporting that Rodgers graduated from Cornell's School of Industrial and Labor Relations but does not have a law degree); *White House Considers Naming Pamela Talkin to Labor Board Seat Held by Mary Cracraft*, 1991 Daily Lab. Rep. (BNA) No. 63, at A-2 (Apr. 2, 1991) (noting that the last non-lawyer to serve on the Board was Sam Zagoria, appointed by President Johnson in 1965).

¹⁴⁴ The Committee argued that Rodgers would use his position to further the interests of his "Teamsters-boss patrons," and that "the nomination of . . . a former top official of the violent, organized-crime-infiltrated Teamsters-union, is an insult to America's working men and women." *Senate Labor Panel Clears NLRB Nominees*, *supra* note 138 (quoting letter from National Right to Work Committee President Reed Larson to Senate Labor Committee). Rodgers was hardly the first Board nomination opposed by the Right to Work Committee—nor the last. See *supra* note 116 (noting that the Committee had dealt the decisive blow to President Reagan's attempted nomination of John Van de Water); *infra* text accompanying notes 243–46 and *infra* note 248 (describing how the Committee and its Senatorial allies blocked the 1988 nomination of John Higgins and the 1991 renomination of Mary Miller Cracraft).

¹⁴⁵ Rodgers's nomination was part of a "package" of appointments that received the approval of the Senate Labor Committee. See *Senate Confirms New Heads of OSHA and MSHA; Late Vote on Two DOL, Four NLRB Posts Possible*, *supra* note 142 (reporting that the nominations of Devaney, Oviatt, and Rodgers to the NLRB and Jerry Hunter to the General Counsel's position, plus two Department of Labor appointments, were approved as a group by

allegations surfaced that Rodgers had pressed the NLRB to settle a pending case against the Teamsters while serving as a White House aide.¹⁴⁶

The appointment of partisans to the Labor Board has only accelerated under President Clinton, to the point where the appointment of both management and union-side lawyers has now become routine. Whereas no Democratic President before Clinton had appointed even a single management lawyer to the Board,¹⁴⁷ Clinton appointed three;¹⁴⁸ indeed, he filled every Republican seat with a management lawyer.¹⁴⁹ Moreover, whereas no union-side lawyer had ever served on the Board or as General Counsel, Clinton appointed one member whose entire career had been spent in union-side practice,¹⁵⁰ and two others who had worked

voice vote of the Senate Labor Committee). The practice of packaging is discussed *infra* text accompanying notes 257–66.

¹⁴⁶ Copies of a 1973 *New York Times* article by Seymour Hersh detailing these allegations rather mysteriously turned up in the mail of various senators. See *NLRB Nominations Placed in Limbo Due to Questions About Donald Rodgers*, 1989 Daily Lab. Rep. (BNA) No. 202, at A-11 (Oct. 20, 1989). The Senate then delayed consideration of the nomination pending an inquiry by the FBI, and President Bush ultimately named John Raudabaugh to the Board in place of Rodgers. See *President Grants Recess Appointments to Dennis Devaney and Clifford Oviatt*, 1989 Daily Lab. Rep. (BNA) No. 241, at A-8 (Dec. 18, 1989) (reporting delay pending FBI inquiry); *President Taps Raudabaugh for NLRB Seat; Chairman Stephens Nominated for Second Term*, *supra* note 138 (reporting replacement of Rodgers by Raudabaugh).

¹⁴⁷ The management lawyers who had served had been appointed by Republicans Eisenhower, Nixon, and Ford. See *supra* notes 29, 66–68, 96–97 and accompanying text; see also *supra* text accompanying note 30 (noting that management-side industrial relations specialist Albert Beeson was an Eisenhower appointee). Democrat Harry Truman had, it is true, appointed a non-lawyer with an industry-side background to the Board in 1947—Copeland Gray. See *supra* note 26. Gray, however, unlike the management lawyers appointed by President Clinton, was not considered a particularly strong voice for management. Compare *supra* note 26 (noting that Gray was largely ignorant of the Act, and that some viewed his appointment as an attempt to thwart effective enforcement of the new Taft-Hartley amendments), and GROSS, BROKEN PROMISE, *supra* note 26, at 24 (discussing Senator Taft's vote against the Gray nomination), with *infra* text accompanying notes 189–94 (discussing the voting records of the management lawyers appointed by President Clinton).

¹⁴⁸ The three were Charles Cohen, Peter Hurtgen, and J. Robert Brame. Cohen began his career with an eight-year stretch at the NLRB, but had been a management lawyer for the fifteen years prior to his appointment. See *White House Appointment of Cohen to NLRB Is Expected to Bring Board to Full Strength*, 1994 Daily Lab. Rep. (BNA) No. 23, at A-1 (Feb. 4, 1994). Hurtgen and Brame had both spent their entire careers as management lawyers. *White House Names Liebman, Hurtgen, Brame to Serve on Board*, 1997 Daily Lab. Rep. (BNA) No. 209, at A-14 (Oct. 29, 1997). Brame had also represented the Republican party. See Bernstein, *How Business is Winning its War with the NLRB*, *supra* note 93, at 59.

¹⁴⁹ Here I do not include recess appointees. President Clinton gave Republican John Higgins, a career Board employee, a recess appointment in 1996. See *White House Selects John E. Higgins to Fill NLRB Vacancy as Recess Appointee*, 1996 Daily Lab. Rep. (BNA) No. 171, at A-9 (Sept. 4, 1996).

¹⁵⁰ See *Philadelphia Lawyer is Named Member of NLRB*, 1993 Daily Lab. Rep. (BNA) No. 159, at A-1 (Aug. 19, 1993) (reporting that after a year clerking for a federal judge,

long stretches on the union side before entering government service.¹⁵¹ In addition, he nominated two different union-side lawyers to be General Counsel,¹⁵² one of whom ultimately served as a recess appointee, at least.¹⁵³

Margaret Browning became a founding member of a union-side law firm, where she remained until her Board appointment).

¹⁵¹ These two appointees were Wilma Liebman and Sarah Fox. Liebman began her career with the NLRB, and at the time of her appointment had been with the Federal Mediation and Conciliation Service for four years. *See White House Names Liebman, Hurtgen, Brame to Serve on Board, supra* note 148. In between those tours of duty, however, she had worked for the Teamsters and the Bricklayers unions for over a dozen years. *See id.* Sarah Fox had spent eight years as counsel to the Bricklayers union before becoming chief counsel (and later minority counsel) to Senator Kennedy and the Senate Labor Committee in 1990. *See White House Announces Intention to Nominate Sarah Fox to Labor Board*, 1995 Daily Lab. Rep. (BNA) No. 243, at A-8 (Dec. 19, 1995); *White House Gives Sarah Fox Recess Appointment to Labor Board*, 1996 Daily Lab. Rep. (BNA) No. 13, at A-11 (Jan. 22, 1996).

¹⁵² *See Clinton Nominates Union Attorney as Next Board General Counsel*, 1998 Daily Lab. Rep. (BNA) No. 78, at d7 (Apr. 23, 1998) [hereinafter *Clinton Nominates Union Attorney*] (reporting that nominee Laurence Cohen is a partner at a union-side firm and general counsel to the International Brotherhood of Electrical Workers and the AFL-CIO Building and Construction Trades Department, and has spent thirty-five years of his forty-year career representing unions); *Clinton Nominates UAW Attorney as Next General Counsel of NLRB*, 1999 Daily Lab. Rep. (BNA) No. 29, at AA-1 (Feb. 12, 1999) (reporting that nominee Leonard Page is associate general counsel of the United Auto Workers and has been with the Auto Workers' legal department for almost thirty years).

It is admittedly questionable whether Clinton ever expected either Cohen or Page to be confirmed; as explained below, there is some suggestion that these appointments were part of a scheme to keep General Counsel Fred Feinstein, whose reappointment had been effectively blocked by Senate Republicans, in office for awhile longer. *See Clinton Nominates Union Attorney, supra* (reporting comments of Daniel Yager of the Labor Policy Association that the Cohen nomination is "a sham" because "they know there's no way the Senate will confirm him," and that action is intended to "keep Feinstein firmly entrenched until the end of the year").

During his four-year term as General Counsel, Feinstein had earned the enmity of the management community, primarily because of his stepped-up use of the General Counsel's authority to seek injunctive relief under NLRA section 10(j). *See Clinton Grants Feinstein Acting Status as Four-Year General Counsel Term Expires*, 1998 Daily Lab. Rep. (BNA) No. 42, at A-15 (Mar. 4, 1998) [hereinafter *Clinton Grants Feinstein Acting Status*] (reporting that the Chamber of Commerce and the National Association of Manufacturers (NAM) are strongly opposed to renomination of Feinstein, and that NAM's letter of opposition to Senate Labor Committee cited Feinstein's use of section 10(j)). Therefore, confirmation to a second term appeared unlikely, and Feinstein withdrew his name from consideration. *See Acting NLRB General Counsel Feinstein Withdraws His Name from Consideration*, 1998 Daily Lab. Rep. (BNA) No. 44, at A-12 (Mar. 6, 1998) (reporting that the chair of the Senate Labor Committee had informed the White House that confirmation was unlikely, and that Feinstein had withdrawn due to Senate opposition).

Within hours of the expiration of Feinstein's term, President Clinton appointed him Acting General Counsel. *See Clinton Grants Feinstein Acting Status, supra*. An acting General Counsel may serve for no more than forty days if Congress is in session, unless a nomination to

Although President Clinton's efforts to place a union-side lawyer in the General Counsel's position drew a certain amount of attention—and opposition,¹⁵⁴ the profoundly partisan character of his appointments to the Board

the post has been submitted to the Senate. *See id.*; *see also* NLRA § 3(d), 29 U.S.C. § 153(d) (1994). However, once a nomination has been submitted, an acting General Counsel may continue in office until either the nomination is confirmed or until the end of the current session of Congress, whichever occurs first. *See Clinton Grants Feinstein Acting Status, supra.* President Clinton first nominated then-retired ex-Board member John Truesdale in order to meet the forty-day deadline. *See Veteran Board Official Keeping Spot Open for Coming 'Real' General Counsel Nominee*, 1998 Daily Lab. Rep. (BNA) No. 67, at d20 (Apr. 8, 1998). This move was followed by the Cohen nomination, which drew strong opposition from the outset. *See Clinton Nominates Union Attorney, supra.* After six months of inaction on Cohen, during which Feinstein remained in office, the Senate adjourned and Clinton gave Feinstein a recess appointment, thus permitting him to serve without confirmation until the end of the 1999 Congressional session or until the confirmation of a successor. *See Feinstein Continues as General Counsel as Clinton Makes Recess Appointment*, 1998 Daily Lab. Rep. (BNA) No. 205, at AA-1 (Oct. 23, 1998). Cohen then withdrew, citing Republican opposition, and the White House nominated Page. *See Clinton Nominates UAW Attorney as Next General Counsel of NLRB, supra.* The Senate Labor Committee took no action on that nomination before adjourning its 1999 session. *See Clinton Names Page General Counsel to Succeed Feinstein in Recess Appointment*, 1999 Daily Lab. Rep. (BNA) No. 229, at A-2 (Nov. 30, 1999). Feinstein, who had originally indicated that he would continue to serve until a successor was confirmed, then informed the President that he would not be available to serve in any capacity upon the expiration of his recess appointment, and Clinton gave Page a recess appointment. *See id.*; *General Counsel Feinstein Notifies Clinton He Will Step Down When Appointment Ends*, 1999 Daily Lab. Rep. (BNA) No. 216, at A-10 (Nov. 9, 1999).

¹⁵³ *See supra* note 152 (recounting how both the Cohen and Page nominations were blocked by Senate inaction, but Page ultimately received a recess appointment). Rather ironically, Laurence Cohen, the first union attorney nominated by President Clinton, had once called for a ban on all partisan appointments to the NLRB. *See Remarks of Attorney Laurence J. Cohen on NLRB Before 31st Annual Institute on Labor Law Sponsored by Southwestern Legal Foundation*, 1984 Daily Lab. Rep. (BNA) No. 205, at E-4 (Oct. 23, 1984) (protesting President Reagan's appointments to the Board and asserting that "a ban on the appointment of partisan union or management representatives would be a great step forward").

¹⁵⁴ *See Feinstein Reflects on Five Years in Office, Describes Improvements, Emerging Issues*, 1999 Daily Lab. Rep. (BNA) No. 91, at A-4 (May 12, 1999) (reporting a comment made at a bar association meeting to the effect that the President should appoint someone from a more neutral background rather than UAW General Counsel Leonard Page to the General Counsel's position); *see also Clinton Nominates Union Attorney, supra* note 152 (reporting high-profile management attorney and former Board General Counsel John Irving's pronouncement that the strategy of nominating a union attorney is "questionable").

When the nomination of union attorney Laurence Cohen was blocked, *supra* note 152, AFL-CIO General Counsel Jonathan Hiatt commented that Senate Republicans had apparently considered Cohen's union-side background to be a disqualifying factor, despite the fact that the last two Republican-appointed General Counsels had come from the management side. *See Feinstein Continues as General Counsel as Clinton Makes Recess Appointment, supra* note 152 (alluding to the appointments of Rosemary Collyer and Jerry Hunter); *supra* text accompanying notes 127–28 and 141. The Republicans and industry representatives in fact tended to couch

itself did not. The historic appointment of Margaret Browning, the first ever union-side attorney to serve, went almost completely unremarked upon,¹⁵⁵ and

their opposition to Cohen in more specific terms. See *Nickles Declares Opposition to Nomination of Cohen to be General Counsel of NLRB*, 1998 Daily Lab. Rep. (BNA) No. 82, at A-4 (Apr. 29, 1998) (reporting Assistant Senate Majority Leader Don Nickles's statement that he is opposed to Cohen based on Cohen's harsh criticism of Senate Republicans in a 1986 speech); *Clinton Nominates Union Attorney*, *supra* note 152 (reporting that the Chamber of Commerce and the Associated Builders and Contractors had voiced opposition to Cohen because of his strong support of "salting"—i.e., an organizing tactic in which union organizers seek jobs with non-union companies with the intent of organizing their workforce). But see *Clinton Nominates Union Attorney*, *supra* note 152 (reporting contention of the National Association of Manufacturers that Cohen "does not fit the standard of 'someone fair and impartial who would administer the statute consistently,'" and management attorney and former General Counsel John Irving's questioning of the administration's wisdom in nominating a union attorney to the position). However, it is highly questionable whether any union-side attorney would have been acceptable to the Republicans and to industry representatives, and there is some perception that Cohen's union-side background was fatal to his nomination. See *id.* (reporting that management attorneys had expressed a high level of respect for Cohen); see also *Senate Votes to Confirm Nominees for Posts at EEOC, Labor Department*, 1998 Daily Lab. Rep. (BNA) No. 204, at AA-1 (Oct. 22, 1998) (reporting that the Cohen nomination was stalled in committee due to opposition of Republican leaders who objected to his background as union lawyer).

¹⁵⁵ BNA's *Daily Labor Report*, which reports extensively on NLRB nominations, carried a single article months before Browning's nomination noting that the AFL-CIO, in a break with tradition, had sanctioned the efforts of various union attorneys to gain appointment to the Board. See *Union Lawyers Seek Posts at NLRB, but No Quick Fix Seen at White House*, 1993 Daily Lab. Rep. (BNA) No. 33, at AA-2 (Feb. 22, 1993). That is almost the sole mention of the historic nature of the appointment of a union attorney. See also *Raudabaugh Faults Critics of Gould Nomination, NLRB Speed, Effectiveness*, 1993 Daily Lab. Rep. (BNA) No. 209, at A-8 (Nov. 1, 1993) (reporting that outgoing Board member and once and future management attorney John Raudabaugh supports Browning nomination, and states that "he has complained for several years that no union attorneys were represented on the Board").

The AFL, of course, had revoked its long-standing opposition to the appointment of union as well as management representatives to the Board a full decade earlier. See *supra* text accompanying notes 124–25 (reporting AFL President Lane Kirkland's declaration that "the old rules are off" in light of the Reagan administration's highly partisan appointments). The AFL's will was not truly put to the test, however, until the election of a Democratic President. See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 253 (stating that the AFL's role in the appointments process under Republican administrations is generally limited to some ad hoc consultation and potential veto power over "particularly obnoxious candidates," while in Democratic administrations, labor—"with] the AFL-CIO at the center"—is "the initiator responsible for coming up with good candidates").

Rather paradoxically, Browning was unanimously confirmed, whereas President Clinton's nomination of Stanford law professor William Gould drew vociferous opposition and thirty-eight "no" votes in the Senate. See Gottesman & Seidl, *supra* note 46, at 751 ("Apparently, thirty-eight republican senators believed that Gould, the career academic, could not be trusted to implement faithfully the NLRA's provisions mediating the rights of employers and unions, but that Browning, the career union lawyer, could.").

the unprecedented appointment of management lawyers by a Democratic President received no notice whatsoever.¹⁵⁶ Obviously a sea change has taken place.

II. THE REVOLUTION'S IMPACT

Part I of this article traced the history of appointments to the NLRB, focusing on the evolution over time in both attitudes toward and the practice concerning the appointment of individuals from a partisan background—i.e., from the management or union side—to the Labor Board. It described how the appointment of management and union-side representatives, once considered completely verboten, has become increasingly common over the last thirty years, to the point where it has now become the norm. This part, in contrast, assesses the impact of these partisan appointments on the NLRB. More specifically, it explores the problem of bias: are Board members who come from the management or union side more one-sided in their decision-making than their colleagues from government or other “impartial” backgrounds?

There are several reasons why one would expect the answer to be “yes.” The first is their past; labor lawyers invariably represent one side or the other¹⁵⁷—not both—and it is difficult to see how someone who has made a career out of representing either unions or management can render an “unbiased” opinion on issues of national labor policy.¹⁵⁸

The second is their future.¹⁵⁹ While the supporters of partisan nominees have continually maintained that Board appointees are no less capable of throwing off their past associations and assuming a neutral mindset once in office than are federal judges who have been prosecutors,¹⁶⁰ for instance, or corporate

¹⁵⁶ Indeed, I have found no mention of the unprecedented nature of these appointments in any publication.

¹⁵⁷ AGENCY IN CRISIS, *supra* note 3, at 50 (“Labor lawyers represent either management or labor.”); *Miller Hearings*, *supra* note 68, at 30–31 (Miller testimony) (stating that only a few attorneys represent both management and labor, and that generally firms represent one side or the other). Former Board Chair Betty Murphy is among the few to have worked for a law firm that represented both sides. See *Murphy Hearings*, *supra* note 89, at 14 (statement of Sen. Taft) (noting that Murphy is one of the very few lawyers who had successfully represented both unions and management); see also *supra* note 89 (indicating that Murphy’s firm represented several international unions in addition to numerous management clients).

¹⁵⁸ AGENCY IN CRISIS, *supra* note 3, at 50 (“Let us recognize reality . . . Labor lawyers . . . tend to share the sentiments of their clients on labor-management issues.”).

¹⁵⁹ See DOUGLAS, *supra* note 63, at 49–50 (referring to the “lure of past and future employment” as one of the most severe temptations of administrators).

¹⁶⁰ In fact, the data suggests that prosecutors-turned-judges continue to be influenced by their prosecutorial experience once on the bench. See C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 362 (1981) (reporting that

lawyers,¹⁶¹ the judicial analogy is wholly inapt. Federal judges have life-time tenure and typically serve out their careers on the bench.¹⁶² NLRB members, in contrast, are “in-and-outers”;¹⁶³ they typically serve for only a few years,¹⁶⁴ and those who come from private practice almost invariably return there.¹⁶⁵ Indeed,

Justices with prosecutorial experience vote much more conservatively in civil liberties cases than do those with no such experience).

¹⁶¹ See *supra* note 48 (discussing opposition to Charles Evan Hughes’s nomination to be Chief Justice).

¹⁶² Landes & Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 886 n.22 (1975) (stating that a federal judicial appointment “is generally a terminal job,” that most federal judges die while still on the bench, and that the average tenure during period 1949–65 was twenty-five years). The percentage of federal judges serving out their careers on the bench may decline a bit in future years given the tendency of some recent Presidents, most notably Ronald Reagan, to appoint much younger men and women to the bench than was formerly the norm. See Judy Mann, *Indefensible Distinctions*, WASH. POST, Oct. 9, 1992, at E03 (noting that Reagan and Bush judicial appointees have tended to be quite young). However, the overall tendency will likely remain the same, and given the extremely brief terms that NLRB members serve in comparison, *infra* note 164, my overall point is not affected by this phenomenon.

¹⁶³ THE IN-AND-OUTERS, *supra* note 102, at xiii (stating that presidential appointees are known as “in-and-outers”—“individuals for whom government service is neither a profession nor a career”).

¹⁶⁴ The full term of an NLRB member is five years, but an individual chosen to fill a vacancy is appointed only for the remainder of her predecessor’s unexpired term. NLRA § 3(a), 29 U.S.C. § 153(a) (1994). Moreover, in the last twenty years reappointment of Board members has become almost unheard of. See *NLRB Member Devaney Cites Philosophical Split, Predicts Dry Spell When Term Ends*, 1994 Daily Lab. Rep. (BNA) No. 219, at d24 (Nov. 16, 1994) [hereinafter *Devaney Cites Philosophical Split*] (noting that tradition of reappointment by successive Presidents that existed twenty years ago had fallen into disfavor). Thus, even when recess appointees, see *supra* note 117, are excluded, the typical term served over the last twenty or thirty years has been two to four years. See AGENCY IN CRISIS, *supra* note 3, at 49 & Appendix B (chart showing terms of service, 1980–96); FIRST SIXTY YEARS, *supra* note 27, at 56 (table showing same for years 1935–95).

¹⁶⁵ As of September 2000, fifteen individuals have come to the Board directly from the management side: management lawyers Guy Farmer, Joseph Jenkins, Edward Miller, Peter Walther, Marshall Babson, Mary Miller Cracraft, Clifford Oviatt, John Raudabaugh, Charles Cohen, J. Robert Brame and Peter Hurtgen; management consultant John Van de Water; in-house counsel Patricia Diaz Dennis, and management-side industrial relations directors Copeland Gray and Albert Beeson. See *supra* Part I. I would also classify Donald Dotson, an in-house management lawyer who served in the Department of Labor for a year and a half before being appointed to the NLRB, as coming from a management-side background. See *supra* note 102 (discussing both Dotson’s background and the classification of presidential appointees based on their “primary occupations,” i.e., “the occupations in which they had spent more of their recent working lives than any other”).

Hurtgen is still on the Board, and I have been unable to trace the post-Board career of Copeland Gray. Of the remaining fourteen, eleven returned to the management side upon leaving the Board. See GROSS, BROKEN PROMISE, *supra* note 26, at 124 (Beeson); WHO’S WHO

IN AMERICA 1118 (52nd ed. 1998) (Dotson); *Address by Former NLRB Member Peter Walther on Future NLRB Direction*, 1983 Daily Lab. Rep. (BNA) No. 25, at F-1 (Feb. 4, 1983) (Walther); *Former Member Brame Joins Law Firm, Gives Up Attempt at Serving Second Term*, *supra* note 19 (Brame); *NLRB Chairmen and General Counsels Explore Agency Role in its 50th Year*, 1985 Daily Lab. Rep. (BNA) No. 133, at A-2 (July 11, 1985) (Farmer, Miller, Van de Water); *Raudabaugh Defends Republican Role in Seeking Disclosure of All NLRB Nominees*, 1993 Daily Lab. Rep. (BNA) No. 225, at AA-1 (Nov. 24, 1993) (Raudabaugh); *Senate Labor Committee Expected to Consider Higgins' Nomination Before the End of April*, 1988 Daily Lab. Rep. (BNA) No. 72, at A-7 (Apr. 14, 1988) (Babson); *Written Testimony of Charles I. Cohen Before Senate Labor and Human Resources Committee*, Hearing on TEAM Act (S. 295), Feb. 12, 1997, reprinted in 1997 Daily Lab. Rep. (BNA) No. 30, at E-1 (Feb. 13, 1997) (Cohen); McGuire Woods Battle & Boothe LLP, *Clifford R. Oviatt, Jr.*, at <http://www.mcguirewoods.com/lawyers/profile.asp?I=253> (last visited Aug. 16, 2000) (Oviatt) [hereinafter *Oviatt Biography*].

As for the other three, Mary Miller Cracraft and Patricia Diaz Dennis stayed in government. *See* WHO'S WHO IN AMERICAN LAW 206 (7th ed. 1992-93) (indicating that Cracraft remained with the agency); *White House Names NLRB Member Patricia Dennis to Seat on Federal Communications Commission*, 1986 Daily Lab. Rep. (BNA) No. 49, at A-14 (Mar. 13, 1986) (reporting that Dennis was appointed to the FCC). It appears that Joseph Jenkins, like Cracraft, assumed another position with the agency. *See General Study into the Procedures of the NLRB and its Administration of the Labor-Management Relations Act of 1947, as Amended: Hearings before the House Subcomm. on National Labor Relations Board of the Comm. on Educ. and Labor*, 87th Cong. 1015 (1961) [hereinafter *Pucinski Subcommittee Hearings*] (statement of Joseph Jenkins) (indicating that Jenkins is Regional Director of the Board's Albuquerque, New Mexico office). Notably, Cracraft, Dennis and Jenkins had all been appointed to the Board at a young age and had had relatively brief careers as management attorneys prior to serving. *See supra* note 131 (indicating that Cracraft had worked for the Board for four years and been an associate in a management-side firm for five years when appointed at age thirty-nine); *supra* notes 119 and 127 (indicating that Dennis had spent three years at a law firm and seven as in-house counsel for two different corporations prior to appointment at age thirty-six); *supra* note 66 (reporting that Jenkins had spent five years in government, including three with the NLRB, and then four years as management lawyer, before appointment to the Board); GROSS, BROKEN PROMISE, *supra* note 26, at 150 (indicating that Jenkins was thirty-eight at time of appointment).

Betty Murphy, who came to the Board from a firm that represented several international unions as well as management clients, *see supra* note 89, went into management-side practice upon the expiration of her term. *See Membership of NLRB Advisory Panel*, 1994 Daily Lab. Rep. (BNA) No. 69, at D-1 (Apr. 12, 1994) (reporting that Murphy is with management-side firm of Baker & Hostetler); *see also NLRB Chairmen and General Counsels Explore Agency Role in its 50th Year*, *supra* (indicating same).

Finally, the three Board General Counsels who came directly from management-side practice, Theophil Kammholz, Peter Nash, and Rosemary Collyer, *see supra* notes 57-58, 96, and 127-28 and accompanying text, all returned there. *See Oversight Hearings on the Subject "Has Labor Law Failed": Joint Hearings before the Subcomm. on Labor-Management Relations of the Senate Comm. on Educ. and Labor and the Manpower and Housing Subcomm. of the House Comm. on Government Operations*, 98th Cong. 217 (1984) (stating that Nash is a partner with the management firm of Ogletree, Deakins, Nash, Smoak & Stewart); *Pucinski Subcommittee Hearings*, *supra*, at 936 (stating that Kammholz is with Vedder, Price, Kaufman & Kammholz); *supra* note 72 (stating that Kammholz returned to management-side practice);

for the vast majority of management lawyers appointed (there is as yet no data on their union-side counterparts),¹⁶⁶ service on the Board has been but a brief hiatus in a decades-long career on the management side.¹⁶⁷

This combination of past and likely future would seem near-lethal to the prospects that a Board member will vote for any rule or policy that would materially disadvantage his or her side of origin. Anyone who has spent the last fifteen or twenty years as a management lawyer is highly likely on that basis alone, it would seem, to adopt the traditional management-side view of recurring disputed issues such as the proper scope of the employer's bargaining obligation¹⁶⁸ or the line between coercive threats and lawful free speech.¹⁶⁹ That

Rosemary M. Collyer, *Union Access: Developments Since Jean Country*, 6 LAB. LAWYER 839, 839 (1990) (stating that Collyer is a partner with the management-side law firm of Crowell & Moring). Jerry Hunter, who was in government at the time of his appointment to the General Counsel's position but had also spent several years as in-house counsel on the management side, *supra* note 141 and accompanying text, also went into management-side practice when his term expired. See *White House Seeks Republican Input on Plans to Fill Four Vacancies at NLRB*, 1997 Daily Lab. Rep. (BNA) No. 118, at AA-1 (June 19, 1997) (quoting Hunter and identifying him as a management lawyer). I have been unable to trace the post-NLRB career of Jerome Fenton, who also came to the General Counsel's post from another government position, but had spent the bulk of his career handling Pan Am Airway's labor relations. See *supra* note 66.

¹⁶⁶ Margaret Browning, the sole member to come to the Board directly from union-side practice, died in office. See *Member Margaret A. Browning Dies of Cancer at Age 46*, 1997 Daily Lab. Rep. (BNA) No. 41, at A-10 (Mar. 3, 1997). Members Wilma Liebman and Sarah Fox, both of whom spent the bulk of their pre-Board careers on the union side, see *supra* note 151, are still serving on the Board at this time. But see *supra* note 19 (stating that as this article goes to press, Member Fox's recess appointment, which followed expiration of her term, is set to expire shortly).

¹⁶⁷ For instance, as of the year 2000, Ed Miller had spent four years on the Board in the course of a fifty-year career as a management lawyer, Clifford Oviatt three and a half years on the Board in the course of a forty-year career on the management side, and Marshall Babson three years on the Board flanked by over twenty as a management lawyer. See *FIRST SIXTY YEARS*, *supra* note 27, at 56 (listing dates of service on Board); Edward B. Miller, *Current NLRB Decisions: Good News and Bad News for Employers*, 49 LAB. L.J. 1042, 1042 (1998) (indicating that Miller remains in management-side practice); *NLRB Management Attorneys Voice Complaints About NLRB's Pursuit of 10(j) Injunctions*, 1998 Daily Lab. Rep. (BNA) No. 52, at AA-1 (Mar. 18, 1998) (indicating that Babson remains in management practice); *Oviatt Biography*, *supra* note 165; *supra* notes 68 and 130 (describing pre-Board backgrounds of Miller and Babson, respectively).

¹⁶⁸ Section 8(d) of the Act requires the parties to confer in good faith regarding "wages, hours, and other terms and conditions of employment." NLRA § 8(d), 29 U.S.C. § 158(d) (1994). The Board and the courts have continually wrestled with the question of whether various entrepreneurial decisions that have an important impact on unit employees' job security, such as plant relocations and partial closures, are "mandatory" subjects of bargaining within section 8(d). See generally JULIUS G. GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW* 133-40 (2d ed. 1999); DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW* 215-17 (1999); Michael C. Harper, *Leveling the Road from Borg-Warner to First National*

is, it seems extremely unlikely that someone who has spent a career arguing for a restrictive view of the range of mandatory bargaining topics and an expansive view of the employer's free speech rights would turn around once on the Board and take the contrary view. When one adds to the equation a near-certain return to management practice a few years down the road, adherence to the management line would seem to become nearly inevitable. As one observer once said of a member of the Federal Communications Commission (FCC):

You take [Commissioner X], he was a lawyer working for broadcasters, [and] when he leaves, he'll work for the industry. He's not going to stick his finger in that industry's eye.¹⁷⁰

Or as the AFL-CIO once stated in a resolution opposing partisan appointments to the Board:

It would be a considerable accomplishment for men whose pasts were spent and whose futures lie with management to achieve even-handed justice as between management and labor. They don't.¹⁷¹

Indeed, the proper judicial analogy, I would argue, goes something like this.

Maintenance: The Scope of Mandatory Bargaining, 68 VA. L. REV. 1447 (1982); see, e.g., *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984) (indicating that four Board members applied three different tests in determining whether an employer's decision to discontinue part of its operations and consolidate the remainder of operations at a new facility was a mandatory subject).

¹⁶⁹ In drawing this line, the Board and the courts must reconcile NLRA section 8(a)(1), which prohibits employers from interfering with, restraining or coercing employees in the exercise of their rights under the Act, with section 8(c), which provides that "[t]he expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." See NLRA §§ 8(a)(1) & 8(c), 29 U.S.C. §§ 158(a)(1) & 158(c) (1994). The line between an implied threat and a lawful "prediction" regarding the likely or potential effects of unionization is a particularly difficult one to draw, and hence is the subject of much litigation. See RAY ET AL., *supra* note 168, at 107-09 (noting that it is "easier to state the Court's rules than to implement them consistently," and that the line between a prediction and a threat is "evasive," and further stating that "[g]iven the subtlety of the distinction between predictions and threats, and the importance of context, it is not hard to find inconsistent NLRB decisions, and inconsistent treatment of those decisions within the circuit courts.")

¹⁷⁰ Hugh Heclo, *The In-and-Out System: A Critical Assessment*, in THE IN-AND-OUTERS, *supra* note 102, at 195, 212.

¹⁷¹ NATIONAL LABOR RELATIONS BOARD, RESOLUTION NO. 164, PROCEEDINGS OF THE THIRD CONSTITUTIONAL CONVENTION OF THE AFL-CIO 593 (1959) (complaining that "the two Board Members . . . appointed by [the Eisenhower] administration whose services with the Board have terminated have reverted promptly to their permanent status as employer attorneys or labor relations consultants"). The Board members complained of were Guy Farmer and Albert Beeson, respectively.

Imagine that the Supreme Court hears nothing but criminal procedure cases, and that Justices serve terms of only a few years. Further imagine that the norms of the criminal law bar require criminal lawyers to choose either the prosecution or defense side early on in their career and to stick with that side,¹⁷² and that Justices who are former prosecutors or defense lawyers almost invariably return to their previous line of work after a few years on the bench. Under these circumstances, would we realistically expect career prosecutors or defense lawyers appointed to the Court to be “unbiased” in their decision-making? I think not.

Having said all this, management and union-side lawyers are certainly not the only potential Board members who are likely to bring a particular bias to the job. That is, while there seems little doubt that management and union representatives appointed to the Board are likely to be highly predisposed to the management or union-side point of view, the real question is whether they are likely to be *more* biased in favor of one side or the other than are appointees drawn from other backgrounds—and that is a more difficult question to answer.

There are several reasons to question whether this is so, or at least to be wary of drawing any hasty conclusions in this regard. First, as an impressionistic matter, there seems to be no shortage of people from a variety of backgrounds who hold rigid opinions on labor issues. As anyone who has taught labor law can attest, any group of students invariably contains some who will rigidly adhere to a pro- or anti-union view of every conceivable issue, regardless of the strength of the arguments on the other side.¹⁷³ Similarly, I think it is fair to say that many academics in the field adhere to a fairly predictable line—more often than not pro-union.¹⁷⁴ In neither instance can this rigidity be wholly accounted for by background; ideology appears to be a powerful driving force as well. Third and finally, the government background that I have classified as “neutral” is hardly monolithic,¹⁷⁵ encompassing as it does not only career NLRB employees and

¹⁷² To the contrary, legions of criminal lawyers have begun their careers on the prosecution side and switched over to criminal defense; nothing could be more common. See *Prosecutors Who Switch Sides*, N.Y. TIMES, June 14, 1995, at A-20 (reporting that “[s]witching from prosecutor to defense attorney is common” and noting, for instance, that “[t]here is a long history of Justice Department officials and federal prosecutors leaving the public payroll to make more money as criminal defense lawyers”).

¹⁷³ When I first began teaching, I worried about stating my opinions on the law too strongly, lest my students should feel bulldozed or browbeaten. I quickly decided, however, that students rarely change their views based on what anyone else in the classroom, myself included, has to say—thus laying my fears to rest.

¹⁷⁴ Here, I must confess to finding myself in agreement with the Labor Policy Association. See AGENCY IN CRISIS, *supra* note 3, at 50 (stating that “labor law professors tend to have well-stated leanings toward either management or labor, usually the latter”).

¹⁷⁵ Cf. James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 410–11 (1999) (noting that commentators have lumped together in the category of “IRS” or “government” background various tax-related positions that are, upon analysis, very different in kind).

those who have served on other federal agencies, but also House and Senate staffers. While it is unclear whether or how much today's highly polarized climate¹⁷⁶ has filtered down to the staff level, at a minimum it seems reasonable to assume that aides to the Democrats on the House or Senate Labor Committee are likely to be relatively sympathetic to unions, and those working for the Republicans more likely to have a management-friendly orientation.

With all of this as background, let us turn now to the data. There are two major sources of data on the voting patterns of individual NLRB members: a study covering the period 1955–79 conducted by economics professors Charles DeLorme and Norman Wood,¹⁷⁷ and an analysis of Board member voting conducted by a management-side law firm and published in the newsletter *Employment Law Alert* that began in 1985 and remains ongoing.¹⁷⁸

Turning first to the 1955–79 study, DeLorme and Wood looked at unfair labor practice (ULP) decisions that were highlighted in the Board's Annual Report because they "involved novel questions or set [important] precedents."¹⁷⁹ Classifying a vote to dismiss a union-filed ULP charge or to sustain an employer-filed charge as "pro-management" and a vote to dismiss an employer-filed charge or to sustain a union-filed charge as "pro-union,"¹⁸⁰ they calculated the percentage of pro-union and pro-management votes cast by each Board member. I have consolidated and reordered their data¹⁸¹ and added information on each

¹⁷⁶ See *infra* text accompanying notes 252–58 and 267–79.

¹⁷⁷ Charles D. DeLorme, Jr. & Norman J. Wood, *Presidential Labor Relations Philosophy and the NLRB*, 12 AKRON BUS. & ECON. REV. 31 (1981).

¹⁷⁸ See *NLRB's Party-Line Split Widens*, EMPLOYMENT LAW ALERT (Nixon Peabody LLP), May 2000 [hereinafter May 2000 EMPLOYMENT LAW ALERT] available at <http://www.nhdd.com/publication> (last visited Aug. 18, 2000) (newsletter on file with the *Ohio State Law Journal*); see also *NLRB Voting Patterns—an Update*, EMPLOYMENT LAW ALERT (forthcoming Jan. 2001) [hereinafter January 2001 EMPLOYMENT LAW ALERT (advance copy)] (advance copy of newsletter provided to author and on file with the *Ohio State Law Journal*). The *Employment Law Alert* is edited by John D. Canoni, currently a partner in the management-side law firm of Nixon Peabody LLP, and formerly a partner in Nixon, Hargrave, Devans & Doyle, one of two firms which merged in July 1999 to form Nixon Peabody. See *Profile: John D. Canoni*, at http://www.nhdd.com/attorneys_bio.asp?ID=598 (last visited Aug. 18, 2000); *About the Firm*, at http://www.nhdd.com/offices_set.asp (last visited Aug. 18, 2000); May 1999 EMPLOYMENT LAW ALERT, *supra* note 18. Prior to 1994, Mr. Canoni was with the law firm of Townley & Updike, and the publication was known as TOWNLEY & UPDIKE'S PERSONNEL PRACTICES NEWSLETTER.

¹⁷⁹ DeLorme & Wood, *supra* note 177, at 31.

¹⁸⁰ *Id.*

¹⁸¹ As DeLorme & Wood were primarily interested in the extent to which Board members' voting behavior reflected the labor relations philosophy of the President who appointed them, see DeLorme & Wood, *supra* note 177, at 31, they broke member voting down by Board; i.e., they listed data separately for the Eisenhower Board, Kennedy-Johnson Board, Nixon-Ford Board, and Carter Board, with a President's Board defined as beginning during the first fiscal year in which the Board majority consisted of three members of the President's party.

Board member's background, party affiliation and the appointing President, yielding the following table (Table 1):

Table 1: 1955–1979 (DeLorme & Wood)

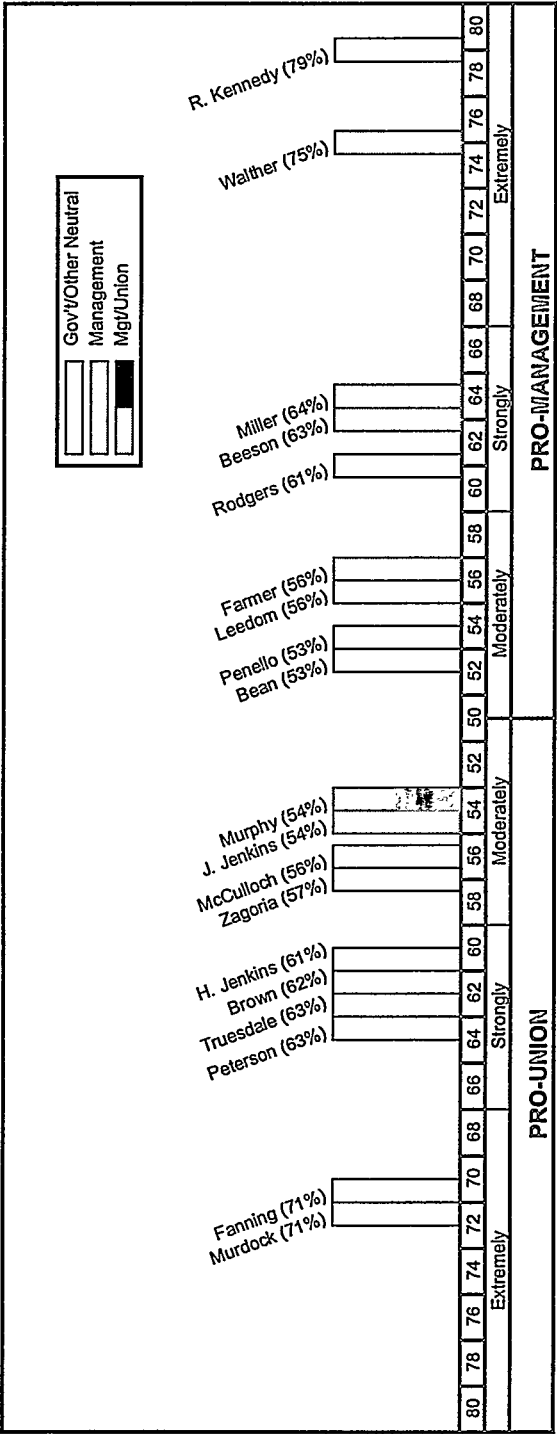
	Member	Bkgrd.	Votes	Party	President
1.	R. Kennedy (1971–75)	Govt.	79% pro-M	Rep.	Nixon
2.	Walther (1975–77)	Mgt.	75% pro-M	Rep.	Ford
3.	Miller (1971–74)	Mgt.	64% pro-M	Rep.	Nixon
4.	Beeson (Mar.–Dec. 1954)	Mgt.	63% pro-M	Rep.	Eisenhower
5.	Rodgers (1953–61)	Govt.	61% pro-M	Rep.	Eisenhower
6.	Farmer (1953–55)	Mgt.	56% pro-M	Ind.	Eisenhower
7.	Leedom (1955–64)	Govt.	56% pro-M	Rep.	Eisenhower
8.	Penello (1972–79)	Govt.	53% pro-M	Dem.	Nixon
9.	Bean (1955–60)	Govt.	53% pro-M	Rep.	Eisenhower
10.	Murphy (1975–79)	Mgt./Union	54% pro-U	Rep.	Ford
9.	J. Jenkins (1957–61)	Mgt.	54% pro-U	Dem.	Eisenhower
8.	McCulloch (1961–70)	Govt.	56% pro-U	Dem.	Kennedy
7.	Zagoria (1965–70)	Govt.	57% pro-U	Dem.	Johnson
6.	H. Jenkins (1963–79)	Acad./Govt.	61% pro-U	Rep.	Kennedy
5.	Brown (1961–71)	Govt.	62% pro-U	Dem.	Kennedy
4.	Truesdale (1978–79)	Govt.	63% pro-U	Dem.	Carter
3.	Peterson (1955–56)	Govt.	63% pro-U	Dem.	Truman
2.	Fanning (1957–79)	Govt.	71% pro-U	Dem.	Eisenhower
1.	Murdock (1955–57)	Govt.	71% pro-U	Dem.	Truman

Looking at Table 1, it is difficult to draw any hard and fast conclusions about the impact of a partisan versus a “neutral” background on Board member voting. Of the nineteen Board members who served during this period, three of the four with the most pro-management voting records (and four of the top six) were former management lawyers or representatives, tending to suggest that those from partisan backgrounds are indeed more biased than others in their decision-making. On the other hand, however, the most pro-management member of all during this period was a career Board employee, Ralph Kennedy.¹⁸² More significantly, I think, it is not clear—particularly when one graphs out the data as in Figure 1 following—that the management lawyers and representatives who

Id. at 32. I have compiled aggregate voting data for members who served on more than one Board, and ordered the aggregate voting records of all members serving between 1955 and 1979 from most pro-management record to most pro-union. Finally, I have rounded the percentages to the nearest whole number.

¹⁸² Kennedy had been Regional Director of the Board's Los Angeles office. *See* GROSS, *BROKEN PROMISE*, *supra* note 26, at 221.

Figure 1: 1955–1979 (DeLorme & Wood)



served between 1955 and 1979 were any more predictably pro-management in their voting than some of their governmental counterparts were predictably pro-union.

Based on Figure 1, the members' voting records appear to fall rather neatly into six categories: extremely pro-union, strongly pro-union, and moderately pro-union on the one hand, and moderately pro-management, strongly pro-management, and extremely pro-management on the other. While the management lawyers and representatives—all of whom were appointed by Republican Presidents—are more likely to be at least strongly pro-management than are those from government who were appointed by Republicans (the majority of whom are moderately pro-management), their records appear no more skewed in favor of management than the records of the Democrat-appointed government employees who fall into the strongly or extremely pro-union category are skewed in favor of unions.¹⁸³ And because no union lawyers or officials were appointed to the Board during this time, there is no comparison to be made between Democrat-appointed union representatives versus Democrat-appointed members from government or other “neutral” backgrounds.

The *Employment Law Alert* data covering the period from September 1985 to the present, however, appear to tell a much different story. In the “disputed” cases tracked by this publication—that is, cases in which at least one Board member filed a separate dissent¹⁸⁴—the voting falls out as follows (Table 2 and Figure 2):¹⁸⁵

¹⁸³ The possible exception here is Peter Walther, who, along with NLRB careerist Ralph Kennedy, appears to be farther out on the “pro-management” spectrum than any of the government employees are on the “pro-union” end of the spectrum.

¹⁸⁴ See May 1999 EMPLOYMENT LAW ALERT, *supra* note 18. Excluded from the data base are cases presenting “[p]rocedural issues that are not strictly labor-management issues.” See January 1999 EMPLOYMENT LAW ALERT, *supra* note 121.

¹⁸⁵ Table 2 was compiled using the cumulative data contained in an advance copy of the January 2001 issue of the *Employment Law Alert*, which covers Board member voting up through the end of July 2000. See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178. I have simply made a few changes in the format. First, I have rounded the percentages to the nearest whole number. Second, whereas the *Employment Law Alert*, which is produced by a management-side law firm, lists the percentage of pro-employer votes for each Board member, I have instead listed the percentage of pro-union votes for those Board members who voted for the union position in a majority of disputed cases. Finally, as with the DeLorme & Wood data, see *supra* text following note 181, I have added information on each Board member's background, political party, and the appointing President.

The “union” designation following Members Fox and Liebman and the “management” designation following Member Dotson are starred because, unlike the other Board members designated as “union” or “management,” these members did not come directly to the Board from representing one side, but rather from government positions. However, as both Fox and Liebman had spent the bulk of their careers working for unions, see *supra* note 151, I believe they are properly characterized as coming from a union-side background. See discussion *supra* note 102 (regarding the classification of presidential appointees by their “career” or “primary

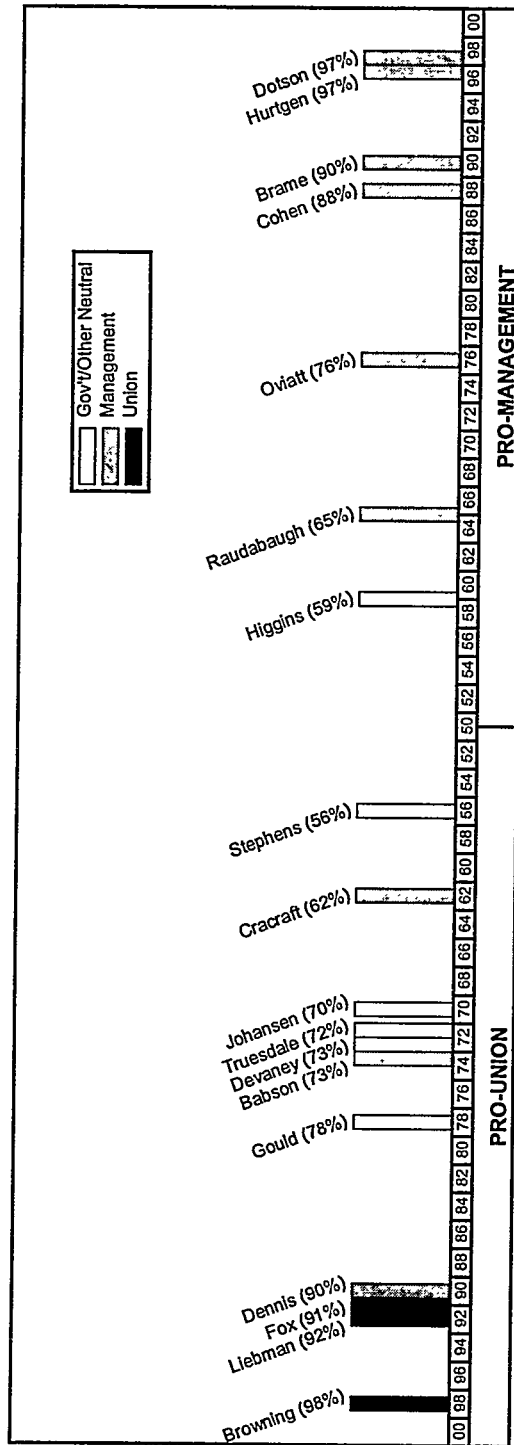
Table 2: 1985–present (*Employment Law Alert*)

	Member	Bkgrd.	Votes	Party	President
1.	Dotson (1983–87)	Mgt.*	97% pro-M	Rep.	Reagan
2.	Hurtgen (1997–__)	Mgt.	97% pro-M	Rep.	Reagan
3.	Brame (1997–2000)	Mgt.	90% pro-M	Rep.	Clinton
4.	Cohen (1994–96)	Mgt.	88% pro-M	Rep.	Clinton
5.	Oviatt (1990–93)	Mgt.	76% pro-M	Rep.	Bush
6.	Raudabaugh (1990–93)	Mgt.	65% pro-M	Rep.	Bush
7.	Higgins (1988–89; 1996–97)	Govt.	59% pro-M	Rep.	Reagan/Clinton
11.	Stephens (1985–95)	Govt.	56% pro-U	Rep.	Reagan
10.	Cracraft (1986–91)	Mgt.	62% pro-U	Dem.	Reagan
9.	Johansen (1985–89)	Govt.	70% pro-U	Rep.	Reagan
8.	Truesdale (1994–96; 1998–__)	Govt.	72% pro-U	Dem.	Clinton
7.	Devaney (1988–94)	Govt.	73% pro-U	Dem.	Reagan
6.	Babson (1985–88)	Mgt.	73% pro-U	Dem.	Reagan
5.	Gould (1994–98)	Acad.	78% pro-U	Dem.	Clinton
4.	Dennis (1983–86)	Mgt.	90% pro-U	Dem.	Reagan
3.	Fox (1995–__)	Union*	91% pro-U	Dem.	Clinton
2.	Liebman (1997–__)	Union*	92% pro-U	Dem.	Clinton
1.	Browning (1994–97)	Union	98% pro-U	Dem.	Clinton

Quite clearly, the former management and union lawyers in the data set have more one-sided voting records than do the former government attorneys. Indeed, the six Board members with the most pro-employer records are all former management lawyers, and the three Board members with the most pro-union records are all former union attorneys¹⁸⁶—with career union attorney Margaret

occupation”—that “in which they had spent more of their recent working lives than any other”). Similarly, I believe that Dotson, who had spent a year or two with the Department of Labor following many years as in-house labor counsel to three different corporations, *see id.*, is properly characterized as coming from a management-side background. *Id.*

¹⁸⁶ *See supra* Table 2, p. 1408. The Board member with the fourth most pro-union voting record, surprisingly, was Patricia Diaz Dennis, a young management lawyer appointed by President Reagan to a Democratic seat. *See id.*; *supra* notes 119, 127 and accompanying text (describing Dennis’s background). The votes recorded for Dennis cover only the last nine months of her three years of Board service. *See* May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (stating that analysis of voting records began in September 1985); FIRST SIXTY YEARS, *supra* note 27, at 56 (indicating that Diaz Dennis served from May 1983 to June 1986). Moreover, her record likely appears more pro-union than it would otherwise given that she served with Donald Dotson. Dotson was one of the most pro-employer members—if not *the* most pro-employer member—ever. *See supra* notes 103–04 and accompanying text (discussing Dotson’s staunch conservatism); *infra* note 191 (describing Dotson as “legendary” for his conservatism and elaborating on his anti-union attitudes); January 2001 EMPLOYMENT LAW

Figure 2: 1985-present (*Employment Law Alert*)

Browning the clear leader in partisan voting over the two former union lawyers who had undergone a "decontamination" period in government before being appointed.¹⁸⁷ The government lawyers in the sample, in contrast, fall disproportionately into the middle of the pack.¹⁸⁸

The phenomenon of management and union-side lawyers voting in a more one-sided fashion than their governmental counterparts during this period,

ALERT (advance copy), *supra* note 178 (reporting that Dotson ranked first in percentage of pro-management votes during September 1985 through July 2000 period). Dotson also dissented in an extraordinary number of cases—thus kicking many Dotson Board cases into the "disputed" category tracked by *Employment Law Alert*. See May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (indicating that Dotson dissented in 161 cases during the period covered by the survey, significantly more than any other Board member); FIRST SIXTY YEARS, *supra* note 27, at 56 (indicating that Dotson served for just slightly over two years during the period tracked by the survey, rendering his huge number of dissents all the more impressive). Nonetheless, even in context, Dennis's voting record indeed appears to have been decidedly pro-union; she voted for the union position in disputed cases much more often than did her Dotson Board compatriots from government as well as management backgrounds. See *How the Board Members are Voting on the Issues—an Update*, TOWNLEY & UPDIKE'S PERSONNEL PRACTICES NEWSLETTER, Nov. 1986 at 4 (predecessor publication to *Employment Law Alert*) (reporting that from September 1985 to Dennis's departure in August 1986, Dennis voted for the union position in 89% of disputed cases, fellow Democrat and management lawyer Marshall Babson in 71%, and Republican ex-government lawyers James Stephens and Bud Johansen in 68% and 54%, respectively; in contrast, Dotson voted for the management position in 93% of disputed cases during that period). Perhaps for this reason, when Dennis's term expired, President Reagan did not reappoint her to the Board, but rather appointed her to the Federal Communications Commission. *Id.* at 2.

¹⁸⁷ Cf. Tate, *supra* note 160, at 362 (reporting findings that Supreme Court Justices who have never been prosecutors have voting records more favorable to civil rights than do former prosecutors, and that among former prosecutors, those who also had some previous judicial experience have voting records more favorable to civil rights than do former prosecutors who lacked "the moderating influence of sitting on the other side of the bench"). Presumably, service as a judge followed that as a prosecutor, and similarly acted as a "decontamination" period.

¹⁸⁸ Mary Miller Cracraft, the one management lawyer who falls very much into the middle of the pack, was, like Patricia Diaz Dennis, see *supra* notes 119 and 127, a young Democrat who had been in management practice for only a short time before her appointment to the Board. See *supra* note 131 (stating that Cracraft had spent four years with the Board and then five as an associate at a management-side law firm before appointment to Board). Indeed, Cracraft had spent almost as much time at the Board as in management-side practice before her appointment. See *id.*

In contrast, Marshall Babson, another young management lawyer whose voting patterns are more similar to those of ex-government appointees than to those of his management-side counterparts, spent his entire pre-Board career on the management side. See *supra* note 130 (indicating that Babson's ten-year career had been spent entirely in management-side practice). Babson's high percentage of pro-union votes in disputed cases is no doubt at least partially attributable to the fact that much of his term overlapped with that of Donald Dotson, who was both rabidly anti-union and extraordinarily prone to filing dissenting opinions. See *supra* note 186 (making the same point with regard to Patricia Diaz Dennis, whose entire term overlapped with that of Dotson).

moreover, holds true when one controls for political party. That is, while the six most pro-management Board members are all Republicans as well as management lawyers, these management lawyers' votes favor the employer more than do those of Republicans from government backgrounds. Similarly, while the eight most pro-union Board members are all Democrats, the Democrats from union backgrounds have favored unions more often than Democrats from governmental or other "neutral" backgrounds.

An extremely striking aspect of the *Employment Law Alert* data, moreover, is just *how* one-sided the voting of the most recent appointees from management and union-side practice has been. In disputed cases, Peter Hurtgen and J. Robert Brame, the management lawyers appointed in 1997, have voted for the employer's position 97% and 90% of the time, respectively, while Charles Cohen, appointed from the management ranks in 1994, racked up an 88% pro-management record.¹⁸⁹ Rather astonishingly, Hurtgen's record of 206–7 as this article goes to press¹⁹⁰ places him in a neck-and-neck competition with the legendary Donald Dotson, chair of the radically conservative "Reagan Board I", for the "title" of most pro-employer member.¹⁹¹

At the other end of the spectrum, 1994 appointee Margaret Browning was

¹⁸⁹ See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178. As noted *supra* note 19, Member Brame's term expired shortly before this article went to press.

¹⁹⁰ See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178. Brame's record as of July 31, 2000, a month before the expiration of his term and the most recent date for which data is available, was 125–14. *Id.*

¹⁹¹ See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178 (noting that Hurtgen "[currently] trails former Chairman Dotson by a minuscule [sic] half of one percentage point," 97.2% to 96.7%, and that readers will have to "stay tuned" to see if Hurtgen will surpass the "legendary" Dotson's pro-employer voting record by the expiration of his term in August 2001); see also January 1999 EMPLOYMENT LAW ALERT, *supra* note 121 (expressing amazement at Hurtgen's then-perfect 61–0 pro-employer record, noting that "[e]ven the legendary Donald Dotson . . . cast a few votes for the union").

Prior to going on the Board, Dotson had written letters to journals asserting that collective bargaining led to "the destruction of individual freedom" and that "unionized labor relations, shortsighted demands, greed, and debilitating work rules" were all major reasons for the decline of once healthy industries. See GROSS, BROKEN PROMISE, *supra* note 26, at 252; see also *supra* text accompanying notes 103–04 (describing Dotson as "staunchly anti-union" and as the proverbial "fox in the chicken coop"). Dotson's tenure was marked by a massive number of overrulings of prior Board cases (always in a conservative direction), an apparently intentional slow-down of case processing (which tends to harm unions), and Dotson's efforts to have a former National Right to Work Committee lawyer assume the General Counsel's chief functions. See WEILER, *supra* note 126, at 19 (stating that the Reagan Board led by the highly ideological Dotson "overturned some forty NLRB doctrines and developed a number of novel positions of its own, almost invariably antithetical to the union position"); Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 269 (describing the "purpose[ful]" slowdown in decisionmaking and attempted subversion of the General Counsel, which led to Congressional hearings).

Hurtgen's equal in predictability; Browning, the only Board member ever to come direct from union-side practice, voted for the union position in 98% (97 of 99) of disputed cases.¹⁹² While the ex-union lawyers appointed in 1997, Wilma Liebman and Sarah Fox, have been a bit less partisan, voting for the union position 92% and 91% of the time, respectively,¹⁹³ this still places them quite far out on the spectrum. Moreover, their voting has become increasingly partisan over time;¹⁹⁴ indeed, Member Fox, rather remarkably, had a 173–0 pro-union streak going through much of 1999 and 2000.¹⁹⁵

A second striking aspect of the *Employment Law Alert* data is its highlighting of the seemingly bizarre phenomenon of a President appointing Board members, invariably from partisan backgrounds, whose positions are *antithetical* to his policy preferences, as well as those whose positions reflect those preferences. More specifically, President Clinton, who as a Democrat would be expected to appoint at least moderately pro-union individuals to the Board, has appointed not only the three most pro-union Board members to serve between 1985 and today—all former union lawyers—but also three of the four most pro-management members—all former management lawyers.

This phenomenon represents a very clear departure from the practice during the 1955–79 period. During the earlier period, Board member voting was extremely closely correlated with the political party of the appointing President; with a single exception, when the members' voting records are lined up running from most pro-management to most pro-union, the members appointed by Republicans all fall at the top end of the list, and those appointed by Democrats at the bottom.¹⁹⁶ And as for the appointment of partisans, while Republicans

¹⁹² See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178.

¹⁹³ *Id.* As of July 31, 2000, Member Liebman had a 187–16 pro-union voting record, and Member Fox a 250–26 pro-union record. *Id.*

¹⁹⁴ See *id.* (reporting that during first seven months of 2000, Fox had a 49–1 pro-union voting record and Liebman a 34–1 pro-union record); May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (reporting that during the last seven months of 1999, Fox had a “perfect” 49–0 pro-union voting record, and Liebman voted for the union position in forty-five of forty-six disputed cases); December 1999 EMPLOYMENT LAW ALERT, *supra* note 19 (reporting that during the first five months of 1999, Fox had a 35–0 pro-union voting record, while Liebman voted for the union position in thirty-six of thirty-seven disputed cases). Ex-management attorney Charles Cohen, like Fox and Liebman, also began to vote on a nearly straight “party-line” basis at some point in his term. See *infra* note 342 (indicating that Cohen compiled a 49–2 or 96% pro-management record during his last year on the Board).

¹⁹⁵ See January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178 (“Member Fox’s amazing string of consecutive pro-union votes ended on July 24, 2000, at 173.”).

¹⁹⁶ See *supra* Table 1, p. 1405. The exception was John Fanning. Fanning, a Democrat who had headed the Defense Department’s industrial relations department, was first appointed by Eisenhower and subsequently reappointed by four other Presidents. See GROSS, BROKEN PROMISE, *supra* note 26, at 151–52. Eisenhower’s appointment of Fanning, one of the most

Eisenhower, Nixon, and Ford put a number of management lawyers or representatives on the Board, they most certainly did not appoint any union lawyers, nor did the Democratic Presidents appoint any management lawyers.

To summarize the results of the above studies, the partisan representatives appointed during the 1955–79 period—all from the management side, and all appointed by Republican Presidents—generally favored management more often than did Board members from government backgrounds appointed by the same Presidents. They were not, however, necessarily any more pro-management in their voting than some of the government employees appointed by Democratic Presidents during this period were pro-union. In the period from 1985 to the present, in contrast, during which there were appointees from the union as well as the management side, both the management and union-side appointees have generally been considerably more one-sided in their voting than their governmental counterparts, with the most recent appointees from partisan backgrounds compiling particularly one-sided records. Moreover, whereas Board member voting in the 1955–79 period was closely correlated with the appointing President's political party, that correlation has been spectacularly exploded during the more recent period, with President Clinton, at least, appointing not only the pro-union Board members that one would expect to see with a Democratic President, but also Board members who have been extraordinarily pro-management in their voting.¹⁹⁷

One question that must be asked, of course, is whether these studies have captured real differences between the two time periods, or whether those differences are instead an artifact of the differing data-gathering techniques employed.¹⁹⁸ I believe that the differences are real, for a number of reasons. First,

liberal Board members ever, has been likened to his appointment of Earl Warren to the Supreme Court. See Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1104 (1985) (stating that Fanning's appointment "may have been a colossal mistake of Earl Warren proportions by a President who failed to recognize a liberal-in-the making"—or may have been an attempted accommodation to the Democratic Congress).

¹⁹⁷ As noted previously, see *supra* note 186, while Reagan appointee Patricia Diaz Dennis comes out on the extreme pro-union end of the spectrum, I attribute this largely to the conservatism of the Board members with whom she served—most notably Donald Dotson, and in no way consider Reagan's appointment of Dennis to be comparable to President Clinton's appointment of hard-line management lawyers J. Robert Brame and Peter Hurtgen.

¹⁹⁸ In comparing the two studies, one must look at two different aspects of each study: the set of cases analyzed, and the means used to classify each Board member's vote. As explained below, the pertinent difference in methodology lies in the respective data sets; the classification techniques appear to be functionally identical.

The *Employment Law Alert* data set, as noted previously, consists of cases in which at least one Board member dissented, excluding "[p]rocedural issues that are not strictly labor-management issues." See *supra* note 184 and accompanying text. DeLorme & Wood, in contrast, looked at unfair labor practice decisions that were highlighted in the NLRB Annual Report because they "involved novel questions or set [important] precedents." See *supra* text

almost all of the phenomena highlighted are based on relationships *within* each data set: for example, I compared the voting records of management lawyers and representatives who served between 1955 and 1979 and ex-government employees who served during the same time period, and then made this same comparison within the 1985–2000 time frame. Second, where I have highlighted differences *across* time periods, those differences are largely qualitative rather than quantitative; such is the case, for instance, with my observations that Board member voting neatly tracked the appointing President's party affiliation in the earlier period but not in the latter, and that it was only in the latter period that the

accompanying note 179. One obvious difference, then, is that DeLorme & Wood excluded representational (i.e., election-related) cases, whereas the *Employment Law Alert* does not. There is no apparent reason, however, why this would cause the marked variance in their results.

This one difference aside, both methods of case selection are clearly aimed at filtering out the multitude of routine cases heard by the Board and focusing in on the more important or controversial cases. See William N. Cooke et al., *The Determinates of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 237 (1995) (stating that 80% of the Board's caseload is made up of routine cases involving the application of well-established law, and 20% of novel or complex cases in which the Board is facing a new issue or considering the revision of an existing policy); cf. James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1711–12 (1999) (analyzing, in an empirical study of judges' votes in labor cases, the following two subgroups of cases in an effort to focus in on more important or controversial issues: cases that were chosen for publication in the Federal Reporter, and cases in which at least one judge disagreed either with the NLRB or with another member of the panel). In routine cases involving the application of well-established law, a Board member's particular bent—i.e., pro-management or pro-union—appears to play a fairly insignificant role. Cooke et al., *supra*, at 254–55. In cases involving the establishment of new law or reconsideration of existing law, in contrast, Board member voting is strongly influenced by the member's own policy preferences. *Id.* These are the type of cases likely to be highlighted in the Board's annual reports, and also those most likely to generate dissents.

As for the classification of each member's vote, DeLorme & Wood classified a vote in favor of dismissing a union unfair labor practice complaint or upholding a management ULP complaint as pro-management, and a vote in favor of upholding a union ULP complaint or dismissing a management ULP complaint as pro-union. See *supra* text accompanying note 180. That is, they zeroed in on the bottom line effect of the member's vote. The *Employment Law Alert*, for its part, tracks whether the member's vote favored the union or management "position." December 1999 EMPLOYMENT LAW ALERT, *supra* note 19. Although it may initially sound as if the latter classification system is a bit more nuanced—that members' votes might be classified differently, for instance, if they reach the same result but advocate applying different legal tests or standards in the pertinent area—that does not appear to be the case. The *Employment Law Alert* does not separately analyze concurrences, which are particularly likely to point up differences between the bottom line of a Board member's vote and the overall thrust of his or her position, but rather treats a concurrence just like a straight vote for the majority position. Thus, at the end of the day it appears that both studies look to the bottom line in classifying each member's vote, and that the methodological difference between them lies solely in the area of case selection.

phenomenon of a President appointing partisans whose policy views were diametrically opposed to his own arose.

While I do assert that the most recent partisan appointees are more one-sided in their voting than those who served in the 1955–79 period, I believe that such a conclusion is eminently reasonable. First, because Donald Dotson is without question one of the most conservative Board members (if not *the* most conservative member) ever to serve,¹⁹⁹ he is a convenient and reliable benchmark; the fact that one of President Clinton's appointees has compiled a record essentially identical to Dotson's and another a record that is within several percentage points of Dotson's very strongly suggests that their voting is more partisan than that of any appointees to the Eisenhower, Nixon, or Ford Boards, none of which is thought to have even remotely approached the Dotson Board in conservatism. Second, at some point, *res ipsa loquitur*: a Board member who votes for one side's position in 90% or 97% of disputed cases or in 173 straight disputed cases is obviously incredibly "predisposed" to one side's viewpoint. Thus, while it is true that one would expect the *Employment Law Alert* study to yield somewhat more extreme numbers than the DeLorme & Wood study because it automatically filters out all cases in which all participating Board members agreed on the result,²⁰⁰ it is difficult to believe—particularly in light of other factors discussed above—that the difference between a 90% or 90+% pro-management or pro-union voting record in cases prompting a dissent and a 60–65% or even 70% pro-management or pro-union record in cases involving a novel question or setting an important precedent is a mere product of the difference in data sets.

Having concluded that the differing voting patterns of Board members from partisan backgrounds serving in the 1955–79 period and those who have served since 1985 indeed transcend methodology, the second question that must be asked is simply "Why?"—that is, what accounts for this pronounced difference? To that question Part III now turns.

III. SHIFTING NORMS IN THE APPOINTMENTS PROCESS

Part I traced the evolution in NLRB appointment practices over the last sixty-five years and described how the once tacitly forbidden practice of appointing management or union-side representatives to the Board has, over time, become commonplace. Part II analyzed the impact of the appointment of partisan representatives on NLRB decision-making and concluded, based on two major studies of Board member voting patterns, that it has varied considerably over time. More specifically, it determined that Board members from partisan

¹⁹⁹ See *supra* note 191.

²⁰⁰ DeLorme & Wood, in contrast, included such cases as long as they were sufficiently important or high-profile to be highlighted in the Board's Annual Report.

backgrounds appointed prior to 1980 undoubtedly tended to favor “their” side in deciding cases, but were not, on the whole, significantly more one-sided in their voting than were a number of their colleagues from government or other impartial backgrounds. The management and union-side lawyers appointed during the past fifteen years, in contrast, have unquestionably voted in a much more lop-sided fashion than their counterparts from impartial backgrounds, with President Clinton’s appointees being particularly prone to voting a straight (or nearly so) pro-labor or pro-management line.

This Part attempts to account for this difference in Board member voting patterns between the two periods under study (1955–79 and 1985 to the present), and in particular for the sharp increase in highly partisan voting by Board members from management and union-side backgrounds in the last decade and a half. As explained in detail below, it concludes that the difference is almost wholly attributable to two inter-related factors: a shift in the norms governing appointments to the NLRB, and a shift in the norms governing presidential appointments generally.

The appointments process consists of two distinct phases:²⁰¹ the selection process that is controlled ultimately at least by the President, and the confirmation process that is controlled largely by the relevant Senate committee.²⁰² The Appointments Clause provides that “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and . . . other Officers of the United States.”²⁰³ It gives little—or really no guidance, however, as to how the “Advice and Consent” process is to operate, and more specifically, as to the appropriate balance of power between the President and the Senate;²⁰⁴ hence, the process governing presidential appointments is entirely norm-governed.

²⁰¹ See G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* xiii (1981) [hereinafter MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS*] (dividing the process into the selection and confirmation phases).

²⁰² See *id.* at 181 (stating that committees have always been the primary decision-making forum in the confirmation process and that floor action is rarely more than ratification of committee action); Christopher J. Deering, *Damned if You Do and Damned if You Don't: The Senate's Role in the Appointments Process*, in *THE IN-AND-OUTERS*, *supra* note 102, at 100 (stating that “individual committees dominate the confirmation process”). In the case of the NLRB, the relevant committee is of course the Senate Labor Committee. That committee makes frequent small changes to its name, and is currently denominated the Committee on Health, Education, Labor and Pensions. See CHRISTIANSON, *supra* note 92, at 477–78, 485–86, 507–08 (listing standing Senate committees up through the 104th Congress); 1 Cong. Index (CCH) 12061 (1999–2000) (containing information on subsequent congresses and indicating current name of committee).

²⁰³ U.S. CONST. art. II, § 2, cl. 2. Those “other Officers,” of course, include members of administrative agencies such as the NLRB.

²⁰⁴ See MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 201, at 94 (“The ambiguity of the constitutional language and the wide range of historical practice impose

Those norms, moreover, are notoriously subject to change over time,²⁰⁵ and this general rule certainly holds true as to Labor Board appointments. As discussed below, the pattern of interaction between the President and the Senate pertaining to NLRB appointments has undergone a rather dramatic shift over the last fifteen to twenty years—a shift that accounts, I believe, for much of the temporal difference in Board member voting behavior that we have seen.

A. *The “Old Rules”: The 1950s through the Late 1970s*

Throughout the 1950s and 60s and most of the 1970s, both the selection and confirmation phases of the NLRB appointments process tended to proceed in a fairly routinized manner.²⁰⁶ As the political scientist Terry Moe has recounted, at the selection phase, either the business or labor community—depending upon whether the President was a Republican or a Democrat—assumed responsibility in the first instance for generating a list of possible nominees, with the other side holding a limited veto power over “particularly obnoxious candidates.”²⁰⁷ In constructing these lists, however, both sides exercised a considerable measure of restraint. This was in part because they viewed the process as a repeat game and feared that short-term “gouging” would lead to retaliation by the other side down the road,²⁰⁸ and in part a response to the moderating influence of the President,²⁰⁹ who generally attempted to accommodate the interests of both labor and management in making NLRB appointments, giving greater weight, of course, to the interests of the “in group.”²¹⁰ Under this “system,” both sides, as Moe describes it:

were looking for the same type of person[:] [a]n experienced attorney who is well known, widely respected, and firmly anchored in the labor-management community. . . . The only real [difference] is that each side also wants people who are known to be partial to its own interests. . . . Thus, business tends to search for

few limits on the behavior of modern participants in the appointment process. Essentially it is theirs to define as they wish, and as they can.”); *see also id.* at 92 (“The most noteworthy characteristic of the appointment process shaped by the Founding Fathers is the legacy of ambiguity it left to subsequent generations of political practitioners.”).

²⁰⁵ *See id.* at 94 (“[A]ny description of the relationship between the President and the Senate in the exercise of the appointment power must always be regarded as time-bound. Patterns of interaction or influence are rarely stable for long.”).

²⁰⁶ *See generally* Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 247–60.

²⁰⁷ *Id.* at 252–53.

²⁰⁸ *See id.* at 247–48.

²⁰⁹ *Id.* at 255; *see also id.* at 266 (stating that “the structure imposed by the president has traditionally been a fundamental constraint on business and labor, producing moderate appointments and regularized politics”).

²¹⁰ *Id.* at 250.

respected professionals who are moderately conservative, and labor for responsible professionals who are moderately liberal.²¹¹

Using these criteria, the “in group”—either business or labor—generated a short list of candidates for the President’s consideration.²¹² The President then chose from among them, usually on the basis of broader political considerations such as the desire to gain a key legislator’s support on some unrelated matter, or perhaps racial or ethnic considerations.²¹³

At the confirmation phase, the unwritten rules governing NLRB nominations up through the late 1970s, consonant with those governing presidential appointments generally,²¹⁴ were as follows:

[T]he primary rule is deference to the president: he has a right to build his own administration as he sees fit and thus to have his appointees confirmed as long as they are not clearly unqualified. . . . [As to what] counts as “unqualified” and therefore as a legitimate reason for voting against confirmation . . . the basic rule is that there must be a “smoking gun” of some sort—a serious character flaw, criminal conduct, demonstrable bias, or obvious inability to carry out the duties of the job. A candidate’s ideology is not a legitimate basis for voting no.²¹⁵

Of course, that did not mean that ideology was irrelevant: “[i]deology (backed by group complaints) may prompt some senators to look high and low for the

²¹¹ *Id.* at 259.

²¹² *Id.* at 254.

²¹³ *Id.* See, e.g., *Reagan Administration Continues Search for Replacement to Fill Jenkins Seat at NLRB*, *supra* note 141 (reporting that the administration’s search for a candidate to replace Member Howard Jenkins “is confirming a new maxim in Washington—that black Republicans who practice labor law on the management side are harder to find than hen’s teeth”).

²¹⁴ See *infra* notes 215–16.

²¹⁵ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 250–51. For a similar description of the “traditional rules” governing presidential appointments generally, see G. Calvin Mackenzie, *Starting Over: The Presidential Appointment Process in 1997* [hereinafter Mackenzie, *Starting Over*], available at http://www.tcf.org/task_forces/nominations/mackenzie/Starting_Over.html (last visited Aug. 18, 2000) (“From the beginning of the Republic an implicit notion, a norm, guided Senate responses to executive branch appointments: the president was entitled to broad latitude in the selection of his own subordinates.”); *id.* (“[O]n matters of ideology or policy views, even those Senators who staunchly disagreed with a nominee would ultimately support—or at least not seek to block—the president’s right to choose the members of his administrative team.”); see also Deering, *supra* note 202, at 116 (stating, in a book chapter published in 1987, that no Senate committee considers policy views, “except in the extreme, to be grounds for rejection”; “the only consensual grounds for rejection are those dealing with a nominee’s personal integrity”).

smoking gun that would give them a legitimate excuse for voting no.”²¹⁶ In the absence of a smoking gun, however, “[t]he White House expects that any qualified individual it nominates will be confirmed,” and “[e]veryone else expects the same.”²¹⁷

With this set of norms in place, it is relatively easy to see why the Labor Board nominees from partisan—specifically, management-side—backgrounds produced in the 1955–79 period were on the order of Guy Farmer and Ed Miller: moderately or more likely strongly pro-management in their voting, but no more so than ex-government employees like Frank McCulloch, Gerald Brown, or Howard Jenkins were pro-union in theirs.²¹⁸ People like Farmer and Miller, that is, are the sort of Board members produced under a system in which the “in group” exercises a measure of self-restraint in generating its short list, the President takes his pick of those listed, and the Senate confirms the President’s choice absent some glaring ethical problem or other smoking gun: a fairly reliable vote for the side favored by the President, but not so knee-jerk or extreme as to provoke the out group into declaring all-out war against the administration and its agenda or retaliating on the appointments front when the White House changes hands.

B. *New Norms Emerge: The Late 1970s and Early 1980s*

So much for the “old rules.” Starting in the late 1970s and early 1980s, the norms governing NLRB appointments clearly began to change. At the selection phase, more strongly ideological candidates began to be suggested by the interested parties or selected at the President’s initiative. And at the confirmation

²¹⁶ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 251; *see, e.g.*, 100 CONG. REC. S1984 (1954) (statement of Sen. Griswold) (declaring that the Senate minority “was opposed to the [Beeson] nomination from the start, but they wanted more time in which to find out why they were opposed”). In the context of presidential appointments generally, *see* MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 201, at 177.

A nominee’s policy views or his political philosophy have a way of conditioning the environment in which his nomination is considered. If his views on important policy issues . . . do not arouse any significant concern on the part of the committee . . . , then [it] is unlikely to be very demanding in its expectations in other areas, like conflict of interest or formal qualifications. If, on the other hand, a nominee’s policy views are a source of concern to some committee members, they will in all probability be very aggressive in their scrutiny of the other criteria, looking for additional evidence to use in building a case against the nomination.

Id. *See, e.g.*, SHOGAN, *supra* note 103, at 112 (stating that opponents of 1969 Supreme Court nominee Clement Haynsworth “seized upon the ethics issue because they doubted they could defeat the nomination on grounds of philosophy. The view that the president had a constitutional right to pick a Supreme Court nominee who conformed to his own beliefs still held sway”)

²¹⁷ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 255.

²¹⁸ *See supra* text accompanying notes 182–83; Table 1, p. 1405, and Figure 1, p. 1406.

stage, moderate nominees of the sort who had been routinely tapped for service and easily confirmed under the "old rules" began to encounter serious opposition in the Senate.

To some degree, these changes were reflective of broader trends in the presidential appointments process generally. For example, the selection of more ideological NLRB appointees during the early Reagan years obviously mirrored the overall trend in appointments during that administration.²¹⁹ And as for the emergence of conflict over NLRB confirmations, it is clear that the norm of deference that had previously governed presidential appointments across the board began to break down, at least on a sporadic basis, sometime in the 1970s or 80s—indeed, almost certainly before²²⁰ the much-discussed and oft-cited Bork nomination of 1987,²²¹ and perhaps as early as the early 1970s.²²²

²¹⁹ See *supra* note 104.

²²⁰ Many date the onset to Ronald Reagan's first administration. See, e.g., Mackenzie, *Starting Over*, *supra* note 215. In this work, written in 1998, Professor Mackenzie dates the "[e]vidence of the weakening of this norm" of deference to the 1980s, citing in particular the Senate Foreign Relations Committee's 1981 rejection of Ernest Lefever's nomination to the position of Assistant Secretary of State for Human Rights, based principally on Lefever's opposition to cutting off foreign aid to countries whose governments violate human rights. See also Dom Bonafede, *Presidential Appointees: The Human Dimension*, in *THE IN-AND-OUTERS*, *supra* note 102, at 120, 127 [hereinafter Bonafede, *Presidential Appointees*] (writing in 1987, Bonafede states that "[r]ecently, the trend within the Senate has been to examine closely the policy views and the political convictions and intentions of the nominee"); *id.* at 128 (stating that "ideology and political philosophy have increasingly become the critical points on which the confirmation process turns"). Bonafede points to "several Reagan appointees [who] failed to win confirmation because of their conservative policy views" in the early 1980s, Lefever among them. *Id.* Moreover, early in Reagan's second term, his nomination of William Bradford Reynolds to the post of Associate Attorney General for Civil Rights was voted down by the Senate Judiciary Committee, in essence because Reynolds shared the President's highly conservative views on civil rights issues. *Id.* at 127–28. Of course, Reagan's nominations were somewhat atypical in that he frequently nominated individuals "whose backgrounds and philosophy were inimical to their agency's mission." See Bonafede, *The White House Personnel Office*, *supra* note 103, at 50 (giving several examples); see, e.g., *supra* text accompanying notes 103–04 (discussing Reagan's appointment of Donald Dotson to head the NLRB).

²²¹ As indicated in the text, there has been a tendency on the part of some—most often Republicans—to trace the breakdown in the norm of deference to the failed Bork nomination of 1987. See Richard L. Berke & Steven A. Holmes, *In Latest Confirmation Delays, a Tougher G.O.P. Strategy*, N.Y. TIMES, Nov. 11, 1997, at A18 (National Edition) (quoting the political director of the American Conservative Union as stating that Republicans learned from Bork's defeat that "'if they [the Democrats] can go after someone for ideology, not just competence, we're going to go after that, too'"); *id.* (noting that many Republicans claim that their opposition to some Clinton nominees is retribution for the "rough time" the Democratic-controlled Senate gave Reagan and Bush appointees such as Bork and John Tower); Kline, *supra* note 105, at 326 (noting that Republicans imply that "gridlock" on judicial nominations during 104th and 105th Congresses [1995–96 and 1997–98] is payback for Democratic

Nonetheless, the transformation that took place in the NLRB appointments process in the late 1970s and early 1980s also appears to have some quite specific roots in developments in the labor arena during that time—and more particularly, in the pitched battle²²³ over proposed labor law reform legislation during the Carter administration.²²⁴ After passing the heavily Democratic House by nearly a hundred votes,²²⁵ the Labor Reform Act of 1977 died in the Senate following a nineteen-day filibuster led by Utah Senator Orrin Hatch.²²⁶ Labor was extremely

treatment of Reagan and Bush judicial nominees, especially Bork and Clarence Thomas).

Because Bork would have been the fifth vote to overrule *Roe v. Wade* and the decisive vote on other hotly contested issues such as affirmative action, *see supra* note 42, there is a fairly strong argument to be made that the treatment of his nomination was not necessarily indicative of a general trend. Indeed, the fact that Antonin Scalia, holder of views very similar to Bork's on these and other issues, was confirmed with no controversy whatsoever just the year before, *see id.*, suggests as much. Moreover, Supreme Court nominations have always been treated differently than other presidential nominations. *See Kline, supra* note 105, at 327; *id.* at 327 n.258 (noting that the Senate has formally rejected twelve Supreme Court nominations).

²²² *See* MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS*, *supra* note 201, at 179. In this earlier work, written in 1981, Mackenzie points to a notable increase in the number of nominations rejected by the Senate after 1972. Mackenzie attributes the Senate's increased aggressiveness at this time to a large increase in Senate staff, which enabled any individual senator troubled by a nomination to conduct his own investigation, "sunshine legislation" that gave the public and the media much greater access to the committee decision-making process, the growing influence of various interest groups in the appointments process, and the increased aggressiveness of journalists, who often unearthed negative information about nominees. *Id.* at 181–85.

Mackenzie asserts that as part of this increased aggressiveness, the Senate began at this time to intensify scrutiny of "predispositional conflicts of interest"—i.e., issues of bias arising from a nominee's background. *Id.* at 105. For instance, in 1973 the Senate rejected the nomination of Robert Morris, a longtime executive with Standard Oil of California, to the Federal Power Commission based on his background. *Id.* at 107.

²²³ *See* GROSS, *BROKEN PROMISE*, *supra* note 26, at 239 (noting that the struggle over the bill was referred to as a "holy war" and that the bill "was among the most heavily lobbied in history").

²²⁴ *See infra* text accompanying notes 225–27; *see also Bitterness of Debate Surrounding NLRB Threatens Functioning of Agency, Lubbers Says, supra* note 58 (reporting General Counsel William Lubbers's comments tracing the highly partisan atmosphere surrounding Board appointments to labor's bitterness over the fact that the labor reform bill was defeated without ever coming to a final vote—i.e., by filibuster). This legislation would have speeded up the Board's election processes considerably and provided for significantly tougher remedies in unfair labor practice cases, among other things. *See* S. 1883, 95th Cong. (1977) (as introduced); H.R. 8410, 95th Cong. (1977) (as passed by House); GROSS, *BROKEN PROMISE*, *supra* note 26, at 238.

²²⁵ *See* GROSS, *BROKEN PROMISE*, *supra* note 26, at 238–39 (reporting that bill passed the House by a vote of 257–163); *Unions Hit the Comeback Trail in Congress*, U.S. NEWS & WORLD REP., Oct. 17, 1977, at 112 (same).

²²⁶ GROSS, *BROKEN PROMISE*, *supra* note 26, at 239.

bitter over this defeat—and over the failure of the legislation even to be put to a vote in the Senate—and in the view of Moe and others, it was this bitterness that caused it to insist upon an appointment to the General Counsel's position that violated the longstanding appointment norms.²²⁷ Although unsuccessful in blocking that appointment,²²⁸ the business community and Senate Republicans retaliated by attempting—this time, with some success—to block other Carter NLRB nominations²²⁹ that would never have been challenged under the “old rules,”²³⁰ and the whole appointments edifice appeared poised to crumble.

²²⁷ See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 264; GROSS, *BROKEN PROMISE*, *supra* note 26, at 243. The appointment was that of William Lubbers, who was not only perceived as somewhat of a Wagner Act throwback, but had spent twenty years on the staff of Board chairman John Fanning. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 243–44. As the General Counsel is supposed to operate independently of the Board, the business community was understandably up in arms over the appointment of someone so close to the chairman. See *id.* at 244; Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 264; see, e.g., GROSS, *BROKEN PROMISE*, *supra* note 26, at 244 (quoting former Board chair Ed Miller, back in management practice, who decried Lubbers nomination as akin to “running the judge’s brother for District Attorney”). Moreover, Lubbers and Fanning had met with top AFL-CIO officials while the labor reform bill was being drafted and at a minimum provided them with “technical assistance,” and business feared that with Lubbers as General Counsel the two would work together to implement elements of the defeated bill by administrative means. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 244–45; see also Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 264 (noting that it was “rumor[ed] that Fanning and Lubbers were dedicated to enacting” at least some portion of the defeated bill administratively).

²²⁸ Lubbers was ultimately confirmed following a months-long battle and a filibuster led by Senator Hatch. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 245; see also *Outgoing General Counsel Discusses “Challenging, Terrific” Experience in Office*, 1999 Daily Lab. Rep. (BNA) No. 223, at C-1 (Nov. 19, 1999) (discussing Lubbers appointment).

²²⁹ The nominations were those of Don Zimmerman, a political independent and aide to Senator Jacob Javits on the Senate Labor Committee, and NLRB careerist John Truesdale, who was being nominated for a second term. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 245–46; Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 265–66.

²³⁰ See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 265 (noting that Zimmerman, who “was well known and liked” as minority counsel to the Senate Labor Committee and was being aggressively promoted by Senator Javits, was “just the type of candidate that labor and Democratic Presidents traditionally settled upon to fill Republican slots on the Board”); *id.* (stating that Truesdale was a “moderately liberal Democrat [who] was highly regarded and well liked by both sides,” and that “business allowed in private that under normal circumstances he would be entirely acceptable”); GROSS, *BROKEN PROMISE*, *supra* note 26, at 246 (noting that in “normal times,” business most likely would not have tried to block either Truesdale or Zimmerman).

Zimmerman was finally confirmed following a Republican-led filibuster that required three cloture votes to end it. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 245–46; Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 265. The Republicans managed to block Truesdale’s reappointment to a full term, however, by stalling on the nomination until the Senate had adjourned. See GROSS, *BROKEN PROMISE*, *supra* note 26, at 245–46. By the time the

The subsequent ascendancy of Ronald Reagan only added fuel to the fire, of course, for Reagan was hardly interested in abiding by the “rules” of the Washington establishment—as to Labor Board appointments or anything else.²³¹ Thus, in his initial round of NLRB appointments Reagan simply ignored the usual list-generating insiders,²³² preferring hard-right, ideologically-driven nominees such as Donald Dotson²³³ to the sort of well-connected, professionally-oriented management lawyers or moderately conservative government employees typically put forth by the Republican in-crowd.²³⁴

Second-round nominations, however, tend to be of a different character than those made at the beginning of a presidential administration,²³⁵ and Reagan was no exception here. During the second half of the Reagan presidency, the selection phase of the process began to return to normal. During his second term,²³⁶

Senate went back into session, Ronald Reagan had assumed the presidency, and chose not to reappoint Truesdale. *See id.*

²³¹ *See Moe, Interests, Institutions and Positive Theory, supra* note 24, at 268 (stating that “the Reagan White House was interested in destroying established traditions, not in following them”).

²³² *See id.* at 267 (reporting that the business community followed the usual practice of submitting a list of possible Board nominees, only to find its suggestions completely ignored—the White House had become a “black hole” into which “[n]ames came in, but . . . never came out again”).

²³³ *See supra* text accompanying notes 102–04 (describing Dotson); *see also supra* text accompanying notes 105–09 (describing early Reagan appointee Robert Hunter). These highly ideological NLRB appointments were of a piece, of course, with Reagan’s overall emphasis in his first-term appointments on ideological purity and loyalty. *See supra* note 104.

²³⁴ *See supra* text accompanying note 211 (describing the type of candidates that the business community and Republicans look for under the “traditional” rules).

²³⁵ *See* MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS, supra* note 201, at 7 (noting the importance of distinguishing between “in-term” nominations and those made at the beginning of an administration).

²³⁶ “Second-round” nominations of course include those made in a President’s second term as well as those made in the middle of, as opposed to at the outset of, a President’s first term. In Reagan’s case, one cannot draw a distinction between “second-round” and second-term NLRB nominations; following his initial round of appointments, completed with the selection of Donald Dotson and Patricia Diaz Dennis, *see supra* text accompanying notes 101–20, he did not have the opportunity to make further appointments to the Board until his second term in office.

In any event, it appears that the type of changes that are likely to occur in a President’s second-term appointments are in the same direction as those that tend to occur in in-term as opposed to “outset of the administration” appointments. *Compare* MACKENZIE, *POLITICS OF PRESIDENTIAL APPOINTMENTS, supra* note 201, at 8 (noting that factors such as the need to pay off electoral debts and symbolic considerations fade in importance once the initial round of appointments is completed), *with* Moe, *Interests, Institutions and Positive Theory, supra* note 24, at 248 (stating that “although there are still promises to be kept, [electoral concerns, i.e., those relating to desire to retain office] decline[] in [the President’s] second term,” during which governance concerns predominate).

President Reagan continued to circumvent the traditional channels in making some of his appointments to the NLRB.²³⁷ At the same time, however, he avoided the sort of highly ideological appointments that had been the hallmark of his first term in office.²³⁸ Moreover, a number of his later nominations not only conformed to the norm of "professionalism" traditionally at work in this area,²³⁹ but involved the selection of precisely the sort of insiders, including government "bureaucrats,"²⁴⁰ that the firebrands in charge of "Reagan I" nominations appeared so scornful of.²⁴¹

At the confirmation phase, however, Reagan's second term saw the re-emergence of trouble clouds on the horizon.²⁴² In an example of the pronounced

²³⁷ For instance, management lawyers Marshall Babson and Mary Miller Cracraft, appointed in 1985 and 1986 respectively, were both young and essentially unknown to the larger labor-management community. See *supra* text accompanying notes 130–131 (describing their respective backgrounds); see also *White House Names Johansen and Babson to Fill Two Vacancies at Labor Board*, *supra* note 130 (quoting an AFL spokesperson as stating with regard to Babson, "we know nothing of [him] except he is a junior management attorney").

²³⁸ Reagan's second-term NLRB appointees were Wilford Johansen, Marshall Babson, James Stephens, Mary Miller Cracraft, Dennis Devaney and John Higgins (who served only a recess appointment due to his confirmation being blocked). See *FIRST SIXTY YEARS*, *supra* note 27, at 56; *infra* notes 244–46 and accompanying text (regarding Higgins). Not one of these can be characterized as an ideologue.

²³⁹ See *Moe, Interests, Institutions and Positive Theory*, *supra* note 24, at 257 (noting that traditionally, Board appointees are first and foremost labor relations attorneys, not ideologues or politicians, and that their approach to policy-making is structured by the standards and norms of their professional community); *id.* at 271 (stating that the appointments process is "oriented around professionalism"); see also *id.* at 269–70 (describing further the norm of "professionalism"); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 60 (1989) (defining "professional" in similar manner).

²⁴⁰ For instance, during his second term Reagan nominated two career Board employees, Wilford Johansen and John Higgins, as well as Dennis Devaney, who had been General Counsel to the Federal Labor Relations Authority and a former member of the Merit Systems Protection Board. See *FLRA General Counsel Devaney Tapped for Fifth Seat at NLRB*, 1988 Daily Lab. Rep. (BNA) No. 200, at A-7 (Oct. 17, 1988); *infra* notes 243–44 and accompanying text (discussing Higgins); *supra* note 130 (discussing Johansen).

²⁴¹ Of course, once "Reagan Board I" had in essence turned NLRB law upside down, Reagan needed only to appoint "conservative in the true sense," status quo-type individuals to keep the law in a very conservative state. See *GROSS, BROKEN PROMISE*, *supra* note 26, at 271 (noting that although "Reagan Board II" was perceived as middle of the road, it neither reversed nor seriously modified most of Dotson Board's major decisions); Douglas E. Ray, *The 1986–87 Labor Board: Has the Pendulum Slowed?*, 29 B.C. L. REV. 1, 18–19 (1987) (stating that the new Board has tempered its position somewhat, but still relies on precedent created by original Reagan Board). In this sense, the appointment of career government employees, who are likely to exhibit a marked respect for institutional values such as maintaining stability in the law, may have served Reagan's purpose very well.

²⁴² That is, a re-emergence of the phenomenon that had first surfaced during the late Carter years, in which well-qualified nominees who would have been easily confirmed under

swing toward moderation that characterized his second round of appointments, in 1988 Reagan nominated NLRB careerist John Higgins to replace the ultra-conservative and highly ideological Donald Dotson.²⁴³ Although Higgins was precisely the sort of well-known, well-respected moderate that Presidents from both parties had been appointing to the Board for years—or even decades—under the traditional rules,²⁴⁴ his nomination was blocked by the one-note and highly

the “old rules” encountered serious opposition, or even defeat, in the Senate. See *supra* notes 229–30 and accompanying text (discussing the battle over Carter nominees John Truesdale and Don Zimmerman). During President Reagan’s first term, there were protracted confirmation battles over two of his appointments, those of John Van de Water to the Board and Rosemary Collyer to the General Counsel’s position, and the Van de Water nomination was ultimately defeated. See *supra* notes 113–17 and accompanying text (Van de Water); *supra* notes 132–35 and accompanying text (Collyer). However, as discussed earlier, neither Van de Water nor Collyer met the traditional criteria for high Board office—Van de Water because of his extensive involvement in anti-union campaigns, and Collyer because of her lack of experience. See *supra* notes 101, 110–12 and 135 and accompanying text. Thus, I do not view the serious opposition that those nominations encountered as symptomatic of a larger breakdown in the norm of deference to the President. Moreover, other first-term Reagan nominees who might legitimately have attracted at least some opposition even under the “old rules” were easily confirmed. See *supra* text accompanying notes 102–09 and 118–22 (discussing background and nominations of Donald Dotson and Robert Hunter). Thus, I do not believe that real trouble signs at the confirmation phase appeared until the second Reagan administration.

²⁴³ See *President Names Higgins to Fill Vacancy at Board*, 1988 Daily Lab. Rep. (BNA) No. 28, at A-13 (Feb. 11, 1988) (describing Higgins’s career); *White House Seeks Candidate to Fill Vacancy at Labor Board*, 1987 Daily Lab. Rep. (BNA) No. 233, at A-7 (Dec. 7, 1987) (making clear that the slot to which Higgins was subsequently named was that formerly occupied by Dotson); see also *supra* notes 103–104 and accompanying text (discussing Dotson); *supra* note 191 (same).

In addition to nominating the moderate Higgins to replace the right-wing ideologue Dotson, in filling the other Republican seat, President Reagan chose the moderate James Stephens to replace the extremely conservative Robert Hunter. Compare *supra* text accompanying notes 105–09 (describing Hunter) and *supra* notes 122–25 and accompanying text (describing the AFL’s bitter complaints about the Hunter appointment), with *AFL-CIO Legislative Chief Denison Says Labor Wave of Issues on Capitol Hill*, 1985 Daily Lab. Rep. (BNA) No. 198, at C-1 (Oct. 11, 1985) (indicating that the AFL-CIO took a neutral position on the Stephens appointment). Moreover, he subsequently named Stephens to replace Dotson as Board chair. *White House Names Member Stephens to Succeed Dotson as Board Chairman*, 1988 Daily Lab. Rep. (BNA) No. 5, at A-8 (Jan. 8, 1988). As to the trend marked by Higgins’s nomination and Stephens’s elevation to the chairmanship, see *President Names Higgins to Fill Vacancy at Board*, *supra* (reporting comment of an AFL spokesperson that Higgins’s nomination and Stephens’s promotion to Board chair “bode[s] for a brighter future” for labor at the Board).

²⁴⁴ See, e.g., *Senate Labor Committee Expected to Consider Higgins’ Nomination Before the End of April*, *supra* note 165 (reporting former General Counsel John Irving’s praise of Higgins as “‘experienced, knowledgeable, and . . . the kind of person from whom no one can expect favors’”); *White House Selects John E. Higgins to Fill NLRB Vacancy As Recess Appointee*, *supra* note 149, at A-10 (stating that Higgins started with the agency in 1964, was Deputy General Counsel from 1976–88, and is “well-known to labor relations attorneys”).

aggressive National Right to Work Committee,²⁴⁵ with help from its senatorial allies such as North Carolina's Jesse Helms.²⁴⁶

The Bush years marked a continuation of the pattern that emerged in the latter half of the Reagan administration: a return to "normalization" of the selection process accompanied by continued destabilization at the confirmation stage. For example, in a return to a Board tradition that had fallen into neglect under Reagan, President Bush reappointed (or attempted to reappoint) a number of the "holdover" Reagan Board members.²⁴⁷ Two of these would-be reappointments, however, one of a moderate Democrat and the other of a moderate Republican, were blocked—both at the behest of the National Right to Work Committee.²⁴⁸ What we got a glimpse of at the tail end of the Reagan

²⁴⁵ *Senate Labor Committee Expected to Consider Higgins' Nomination Before the End of April*, *supra* note 165 (reporting that the only opposition to Higgins's nomination is from the National Right to Work Committee, but that the Committee is aiming an intensive effort at members of the Senate Labor Committee); *White House Selects John E. Higgins to Fill NLRB Vacancy As Recess Appointee*, *supra* note 149, at A-10 (noting that Higgins had served as recess appointee in 1988, but that opposition of the National Right to Work Committee had blocked a vote on his confirmation to a full term). The Right to Work Committee had also dealt the decisive blow to the earlier nomination of John Van de Water. GROSS, BROKEN PROMISE, *supra* note 26, at 250; *supra* note 116.

²⁴⁶ See *Right-Wing Opposition Clouds Prospect for Confirmation of Higgins to NLRB Seat*, 1988 Daily Lab. Rep. (BNA) No. 115, at A-10 (June 15, 1988) (stating that Helms had placed a hold on the nomination, which was opposed by the National Right to Work Committee). Also aiding in the effort was South Carolina Senator Strom Thurmond. *Id.*

²⁴⁷ Dennis Devaney and James Stephens were successfully reappointed. *President Taps Raudabaugh for NLRB Seat; Chairman Stephens Nominated for Second Term*, *supra* note 138; *White House Announces Reappointment of Devaney to Five-Year Term at NLRB*, 1989 Daily Lab. Rep. (BNA) No. 189, at A-9 (Oct. 2, 1989). The unsuccessful attempts are discussed *infra* note 248 and accompanying text.

²⁴⁸ The Democrat was Mary Miller Cracraft, and the Republican was John Higgins. President Bush formally nominated Cracraft for a second term, but a vote on the nomination was blocked by a senatorial "hold" placed on the nomination in response to pressure from the Right to Work Committee. See *White House Will Not Renominate Cracraft for Second Term on NLRB*, Washington Insider (BNA), Nov. 21, 1991, LEXIS, Nexis Library, BNA File. President Bush then elected not to resubmit the nomination following the Senate's return from its recess, due to the Committee's opposition. *Id.*

Higgins, for his part, had received a recess appointment from President Reagan after the Right to Work Committee had blocked Reagan's attempt to appoint Higgins to the Board. See *supra* note 245. Although President Bush never formally submitted Higgins's name to the Senate, it appears that he had hoped to reappoint Higgins, and ultimately chose not to do so only because of the adamant opposition of the Right to Work Committee and Senator Helms. See *Bush Administration Gathers Prospects for Post of Labor Board General Counsel*, *supra* note 58, at A-10 (stating that the National Right to Work Committee had made the selection of a new General Counsel and the removal from the Board of Higgins, who was currently serving as recess appointee, its "litmus test for the new Bush administration"); *Bush Administration Expected to Name Diane Burkley to Seat on Labor Board*, *supra* note 142 (stating that the "key unanswered question" was whether the administration would bend to Senator Helms and drop

administration, and more than a glimpse of during the Bush years, then, was a shift in the balance of power over the appointments process—a shift in the direction of greater senatorial control over the process at the expense of the President. Under the traditional rules, the President was viewed as having the right to shape the NLRB as he wished, and thus to have his nominees confirmed by the Senate as long as they were not clearly unqualified.²⁴⁹ The late 1980s and early 1990s, in contrast, witnessed the willingness of some members of the Senate, acting in response to intense interest-group lobbying,²⁵⁰ to block nominees who easily met the traditional criteria for membership on the NLRB—and their colleagues' willingness to go along with such maneuvers.²⁵¹

During the Clinton years, the Senate has arrogated even further power to itself. As it did during the Bush and second Reagan administrations, at the confirmation stage it has denied the President his traditional prerogative of staffing the Board with any reasonably well-qualified individuals of his choosing. It has done this in either of two ways: by simply refusing to act on nominations that would have been routinely confirmed under the "old rules,"²⁵² or by making

Higgins from the Board); *supra* note 145 (reporting the subsequent approval of a package of Bush nominees which did not include Higgins).

²⁴⁹ See *supra* text accompanying notes 214–17.

²⁵⁰ In particular, that of the National Right to Work Committee. See *supra* notes 243–48 and accompanying text.

²⁵¹ See *infra* text accompanying notes 293–95 (discussing the mechanisms by which individual senators cede some measure of influence over a large number of issues in return for an extraordinarily large measure of influence over those issues of greatest electoral concern to themselves).

²⁵² For instance, at the outset of the Clinton administration, the Senate simply refused, for nine months, to schedule a vote on the nomination of Stanford law professor William Gould, a well-known and well-regarded figure in the labor law world. Gottesman & Seidl, *supra* note 46, at 750 (noting that nomination was stalled for nine months); Steven Greenhouse, *Parting Shots by Labor Board Chief*, N.Y. TIMES, July 23, 1998, at A22 (referring to Gould as "one of the nation's foremost authorities on labor law"); Flynn, *supra* note 91, at 481–83 (describing Gould's extremely impressive credentials). While Gould was ultimately confirmed, matters certainly did not improve with time; when President Clinton nominated John Truesdale, the consummate NLRB careerist, to replace Gould, the Senate Labor Committee took no action on the nomination for over a year. See *infra* notes 319–20 and accompanying text. Truesdale, who would have been eminently confirmable under the "old rules," had also, ironically enough, been caught in the crossfire and blocked by the Senate during the tumultuous final months of the Carter administration. See *supra* notes 229–30 and accompanying text.

Similarly, the Senate refused to act on two separate nominations, first Laurence Cohen and then Leonard Page, to the General Counsel's position. See *supra* notes 152–54. While Cohen and Page are both union attorneys, and the appointment of a union-side lawyer to the General Counsel's position was historically unprecedented, a number of management-side attorneys had served as General Counsel under Republican administrations. See *supra* note 154 (Rosemary Collyer and Jerry Hunter); *supra* text accompanying notes 57–58 (Theophil Kammholz); *supra* note 96 (Pete Nash); *supra* note 66 (Jerome Fenton). Hence, I think that either of these appointments would have passed muster under the "old rules." Cohen, in particular, is

it clear even before such nominations were made that the nominee was "unconfirmable,"²⁵³ thus forcing the President to begin his search anew.²⁵⁴

Even more significantly, however, during the past several years the Senate—or rather, certain Senate power brokers and the interest groups with whom they are allied—has begun to take significant control over the *selection* phase of the process as well. When the traditional rules held sway, groups such as the AFL-CIO and the Chamber of Commerce indeed played a significant role at that stage,

extremely well-known and well-regarded in the labor-management community. See Tallent, *Cohen Possible Nominees for Upcoming Vacancies at Labor Board*, 1995 Daily Lab. Rep. (BNA) No. 159, at A-8 (Aug. 17, 1995) (commenting on the proposed packaged appointments of Cohen and management attorney Stephen Tallent to the Board, high-profile management attorney and former Nixon General Counsel John Irving "praised both as experienced practitioners of the highest integrity who are highly regarded by their colleagues," and stated, in reference to Cohen's union-side background, that as a Board member Cohen "would be 'capable of rising above his instincts'"); see also *Clinton Nominates Union Attorney*, *supra* note 152 (noting Irving's statement that he has "'the very highest regard for [Cohen]'").

²⁵³ See, e.g., *Senate and White House Continue Talks on Filling Vacancies at Labor Board*, 1994 Daily Lab. Rep. (BNA) No. 5, at AA-1 (Jan. 7, 1994) (reporting that the White House had submitted names to Senate Republicans to fill the remaining vacancy on the Board, but the Republicans "ha[d] rejected the White House candidates and insisted instead" on the appointment of their candidate, Eastman Kodak's Mary Harrington, who was "'the unanimous choice of the business community'"); *infra* note 318 and accompanying text (discussing how various names were floated by the White House but rejected by Senate Republicans in 1993–94 as administration sought to break the logjam over Gould); *Sen. Kassebaum: A Moderate Reformer Charts New Course for Labor Committee*, 1995 Daily Lab. Rep. (BNA) No. 6, at C-1, C-2 (Jan. 10, 1995) (quoting the chair of the Senate Labor and Human Resources Committee as stating that it will be "'very rough sledding to get confirmation'" if the administration follows through on its plans to nominate Kennedy aide Sarah Fox to the Board); *White House Gives Sarah Fox Recess Appointment to Labor Board*, *supra* note 151 (reporting that Clinton gave Fox a recess appointment in order to "[c]ircumvent[] a possible bitter confirmation fight"); *White House Seeks Republican Input on Plans to Fill Four Vacancies at NLRB*, *supra* note 165 (reporting that proposed plan called for the appointment, *inter alia*, of NLRB careerist John Higgins to the Republican seat, but that former Bush-appointed General Counsel Jerry Hunter emphasized that any nominee must meet with the Republicans' approval and questioned whether a careerist as opposed to a management attorney would be acceptable to them); *Senate Confirms Sarah Fox, Robert Brame, Peter Hurtgen, Wilma Liebman, as NLRB Members*, NLRB Press Release R-2265, at 1 (Nov. 10, 1997) (indicating that the deal finally concluded provided for management attorneys in both Republican seats and that Higgins, who had been serving as recess appointee, had stepped down); see also *Acting NLRB General Counsel Feinstein Withdraws His Name From Consideration*, *supra* note 152 (reporting that Senate Labor Committee chair James Jeffords had "told the White House he did not think [General Counsel Fred] Feinstein could be confirmed" to a second term, and that Feinstein subsequently withdrew his name from consideration, citing Senate opposition to his appointment).

²⁵⁴ Both of these mechanisms were at work in the second Reagan administration and the Bush administration as well. See *supra* note 248 (stating that Reagan's nomination of John Higgins and Bush's attempted renomination of Mary Miller Cracraft were blocked by senatorial holds, and that President Bush had then elected not to resubmit the Cracraft nomination and not to nominate Higgins due to the heated opposition to those nominations).

either by generating a short list of potential nominees when they were the “in group,” or, when they were not, through the potential exercise of a limited veto power over the other side’s candidates.²⁵⁵ At the same time, however, both sides were strongly influenced by the President’s typical preference for a moderate nominee in generating their short list, and the President’s right to choose freely from among the names ultimately put forward was completely unquestioned.²⁵⁶

All that has now changed, however. Throughout the Clinton presidency, the Senate has not only frequently blocked the President’s nominees or would-be nominees,²⁵⁷ but has insisted that the President acquiesce to certain of *its* choices—or more specifically, those of key Senate Republicans—as the price of getting *any* of his Board nominees confirmed.²⁵⁸ The mechanism that it has used to enforce this “bargain” is an insistence on “packaged” nominations.

Up until the mid-1980s, each NLRB nominee had been given individual consideration by the Senate Labor Committee and by the Senate as a whole. That is, even when the President made more than one Board appointment at a particular time, the nominees typically received individualized hearings before the committee, and the nominations were voted on separately both in committee and on the Senate floor.²⁵⁹ This practice began to fall by the wayside in the mid-²⁶⁰ to

²⁵⁵ See *supra* text accompanying note 207.

²⁵⁶ See *supra* text accompanying notes 208–17.

²⁵⁷ See *supra* notes 252–54 and accompanying text.

²⁵⁸ See *White House Appointment of Cohen to NLRB is Expected to Bring Board to Full Strength*, *supra* note 148 (noting that the nominations of William Gould and Margaret Browning to the Board and Fred Feinstein to the General Counsel’s position had “languished for several months in the Senate” due to opposition to Gould and the Republican’s insistence on an “acceptable candidate” for the GOP seat on the Board); *infra* notes 329–30 and accompanying text (indicating that the appointment of Charles Cohen eventually broke the logjam); *infra* notes 261–66 and accompanying text (discussing the practice of “packaging” nominations).

²⁵⁹ See, e.g., *Denham/Murdock/Gray Hearings*, *supra* note 26 (indicating that Robert Denham, nominated as General Counsel, and Abe Murdock and Copeland Gray, both nominated to the Board, appeared separately before the Senate Labor Committee to make statements and answer questions); GROSS, BROKEN PROMISE, *supra* note 26, at 24 (indicating that separate committee votes were taken on each of these three nominees); *Walther/Irving Hearings*, *supra* note 96, at 10–21 (indicating that Walther and Irving appeared separately to give statements and answer questions).

²⁶⁰ The nominations marking the transition from individualized treatment to “packaging” were those of Wilford Johansen and Marshall Babson in 1985. While each man submitted a brief statement to the Senate Labor Committee, see *Babson and Johansen Statements*, *supra* note 130, they appeared jointly before the committee, and the nominations were voted on together rather than separately. *Marshall B. Babson, of Connecticut, and Wilford W. Johansen, of California, to be Members of the National Labor Relations Board: Hearing before the Senate Comm. on Labor and Human Resources*, 99th Cong. 9–14 (1986) [hereinafter *Babson/Johansen Hearings*] (indicating joint appearance before committee); 131 CONG. REC. S13578 (May 23, 1985) (indicating that nominations were confirmed together in voice vote);

late 1980s,²⁶¹ however, and by the time of the Clinton administration, the practice of packaging nominations had become completely routine. Recess appointments aside,²⁶² with a single exception²⁶³ President Clinton's appointments to the Board have consisted entirely of two separate package deals: an initial round of appointments in 1993–94²⁶⁴ and a second round in 1997.²⁶⁵ The packaging of

see also *Senate Labor Committee Clears Nominations of Johansen and Babson to Vacant NLRB Seats*, *supra* note 136 (reporting approval of nominations by telephone poll of committee).

²⁶¹ In 1989, the nominations of three Board members and the General Counsel were treated as a package. All four nominations were approved by a joint voice vote (and without hearings) in committee. *Senate Labor Panel Clears NLRB Nominees, DOL Nominees, Approves Increased Pension and OSHA Penalties*, *supra* note 138 (reporting that the nominations of Dennis Devaney, Clifford Oviatt and Donald Rodgers to Board seats and Jerry Hunter to the General Counsel's position were approved by a joint voice vote, and that Senator Kennedy had acknowledged that this "en bloc process" was a departure from the past practice of holding individualized hearings). After allegations of impropriety on the part of one of the Board nominees arose, see *supra* text accompanying note 146, the nomination to the General Counsel's position—a solo position which must be filled if the agency is to function—went forward separately and was approved by the Senate. See 135 CONG. REC. S31740 (Nov. 21, 1989) (reporting Senate's approval of the nomination of Jerry Hunter as General Counsel); see also *Cohen Withdraws from Consideration for General Counsel, Citing GOP Opposition*, 1999 Daily Lab. Rep. (BNA) No. 11, at A-9 (Jan. 19, 1999) (noting that the Board cannot function without a General Counsel, who oversees the thirty-three regional offices). A substitution was made in the original package, and the three Board nominations were then confirmed by the Senate. *President Taps Raudabaugh for NLRB Seat; Chairman Stephens Nominated for Second Term*, *supra* note 138 (indicating that John Raudabaugh replaced Donald Rodgers in the package); *Senate Approves Nominees to NLRB, NMB, Inspector General at Labor*, *supra* note 142 (reporting Senate's approval of the nominations of Oviatt, Devaney, and John Raudabaugh to the NLRB); 136 CONG. REC. S22950 (Aug. 3, 1990) (indicating that the three nominations were confirmed on the same day).

²⁶² There were many such appointments during the Clinton years. *Administration Faces Possibility of Four Vacancies, No Quorum at NLRB*, 1997 Daily Lab. Rep. (BNA) No. 202, at A-8 (Oct. 20, 1997) (noting that Clinton had had to make a number of recess appointments simply to keep the agency functioning). Rather remarkably, career Board employee John Truesdale received three separate recess appointments during the Clinton years. *Clinton Intends to Nominate Truesdale to Fill Seat Left Open by Gould's Departure*, 1998 Daily Lab. Rep. (BNA) No. 199, at A-5 (Oct. 15, 1998) (stating that Truesdale had served from January 1994 through March 1994 and from December 1994 through January 1996 as recess appointee); *Clinton Names Truesdale NLRB Chairman to Succeed Gould in Recess Appointment*, 1998 Daily Lab. Rep. (BNA) No. 234, at A-9 (Dec. 7, 1998) (reporting Truesdale's third recess appointment).

²⁶³ That exception was the eleventh-hour confirmation of John Truesdale in December 1999, after Truesdale's nomination had been languishing in the Labor Committee for over a year. See *infra* text accompanying notes 319–20 (discussing Truesdale's nomination, the committee's failure to act, and Truesdale's eventual confirmation).

²⁶⁴ See *Senate Confirms Gould Nomination to NLRB; Feinstein, Cohen and Browning Also Approved*, 1994 Daily Lab. Rep. (BNA) No. 41, at AA-1 (Mar. 3, 1994) (reporting that, after Republicans had insisted that the vacancies be treated as a package, the Senate had

confirmed Stanford law professor William Gould by a 58–38 vote, and then confirmed the nominations of Margaret Browning and Charles Cohen to the Board and Fred Feinstein as General Counsel by a unanimous voice vote).

During his first year in office, President Clinton had an unprecedented opportunity to reshape the NLRB; three of the five Board seats, plus the General Counsel's position, needed to be filled. *Vacancies on NLRB Will Allow Clinton to Create 'More Activist' Board, Devaney Says*, 1993 Daily Lab. Rep. (BNA) No. 14, at A-16 (Jan. 25, 1993). The President began by making a single appointment—that of Stanford law professor William Gould to the Board. *White House Names Professor Gould of Stanford University to Labor Board*, 1993 Daily Lab. Rep. (BNA) No. 123, at A-4 (June 29, 1993). The Senate, however—or at least its forty-four Republicans—refused to move on Gould's nomination until the complete lineup had been revealed and agreed upon, and the President ultimately acquiesced in order to avoid a filibuster. *Gould Nomination Reaches Senate Roadblock; Labor Board Set to Lose Quorum of Three Members*, 1993 Daily Lab. Rep. (BNA) No. 224, at A-10 (Nov. 23, 1993) (reporting that the Gould nomination was stalled in the Senate as the Republicans had refused to act until “the White House disclose[d] its complete package of nominees,” including a Republican to the fifth seat); *Senate Confirms Gould Nomination to NLRB; Feinstein, Cohen and Browning Also Approved, supra* (recounting this “wrangling” over the Gould nomination and indicating that there were forty-four Republicans in the Senate at this point); *White House Seeks to Avert Senate Showdown; Circulates Names for NLRB Republican Seat*, 1993 Daily Lab. Rep. (BNA) No. 226, at A-6, A-7 (Nov. 26, 1993) (describing how the White House had originally resisted treating the nominations as a package and had told the Republicans that it would confer regarding the appointment to the fifth seat only after the Senate had voted on Gould, but had later abandoned this position in order to avoid risking a filibuster on Gould's nomination); *see also supra* note 253 (discussing further the attempts to put together a package that would be acceptable to the Republicans).

²⁶⁵ *Senate Confirms Four Clinton Nominees Giving Labor Board Five-Member Complement*, 1997 Daily Lab. Rep. (BNA) No. 218, at A-1 (Nov. 12, 1997) (reporting confirmation of Peter Hurtgen, J. Robert Brame, Wilma Liebman, and Sarah Fox by voice vote in the Senate); *Senate Confirms Sarah Fox, Robert Brame, Peter Hurtgen, Wilma Liebman, as NLRB Members, supra* note 253; *see also infra* notes 331–34 and accompanying text.

After the Senate Republicans had successfully forced President Clinton into a package deal once, *see supra* note 264, it came to be assumed on all sides that the President could not get any Democratic nominee through without pairing his selection with a Republican-approved—or even Republican-selected—counterweight. *See NLRB Member Devaney Cites Philosophical Split, supra* note 164 (reporting outgoing Democratic Board Member Dennis Devaney's suggestion that in order to “get [the] Republicans to go along” with its choice to fill his seat, the administration might package this appointment with the reappointment of Republican Member James Stephens, whose term was set to expire in the upcoming year); *NLRB Faces Increased Scrutiny in Wake of GOP Takeover*, 1995 Daily Lab. Rep. (BNA) No. 19, at S-35, S-37 (Jan. 30, 1995) (reporting Senator Kassebaum's suggestion that the appointment of a “good Republican” to the seat held by Stephens would be necessary to achieve any movement on the expected nomination of Democrat Sarah Fox, a long-time aide to Senator Edward Kennedy, to the Democratic seat vacated by Devaney;—i.e., that the nomination of a Democrat and a “good Republican” should be “twinned”).

A group of well-connected labor attorneys subsequently coalesced around a package deal involving the pairing of two well-known labor lawyers, one from each side of the fence (or table). *Tallent, Cohen Possible Nominees for Upcoming Vacancies at Labor Board, supra* note 252 (reporting that a group of prominent lawyers, including former General Counsel John

these appointments, it bears emphasizing, was hardly a matter of the President's choice, but rather was forced upon him by the Senate²⁶⁶ as a means of expanding and consolidating its power over NLRB appointments.

The NLRB, of course, does not exist in a political vacuum, and much of what has taken place in the realm of Labor Board appointments during the Clinton years tracks developments in the appointments process generally. The phenomenon of the Senate refusing to grant the President the traditional presumption in favor of his nominees, for instance, has hardly been confined to the labor arena.²⁶⁷ To the contrary, during the past few years significant controversy has emerged over nominations that would have been routinely approved in earlier times²⁶⁸—the nominations of Bill Lann Lee to the position of Assistant Attorney General for Civil Rights²⁶⁹ and William Weld to that of

Irving, were pushing for the appointment of management lawyer Stephen Tallent to the Republican seat and union lawyer Laurence Cohen to the Democratic seat). No deal on those two seats was ever struck, however, and the Board limped along on recess appointments until late 1997, by which time four seats rather than two were open. *See Administration Faces Possibility of Four Vacancies, No Quorum, at NLRB*, *supra* note 262. At that point the deal between Senators Lott and Kennedy described *infra* notes 331–34 and accompanying text was struck.

The President also found it essentially impossible to get a General Counsel confirmed once the term of Fred Feinstein, who had taken office as part of a package deal, expired. *See supra* note 264 (discussing the package deal consisting of Feinstein and three Board nominees); *supra* notes 152–54 and accompanying text (describing the President's unsuccessful attempts to get General Counsel nominees confirmed); *NLRB Heads Into 2000 With Improved Budget, Full Board, New General Counsel*, 2000 Daily Lab. Rep. (BNA) No. 6, at S-5 (Jan. 10, 2000) (suggesting that Senate Republicans, who hope to regain the White House in the upcoming election, simply will not confirm a Democratic General Counsel to a full term at this point).

²⁶⁶ *See supra* notes 264–65 (describing the origin and evolution of the two “package deals” under Clinton).

²⁶⁷ *See Berke & Holmes, supra* note 221 (stating that the Senate Republicans were even less inclined in late 1997 than early in the Clinton presidency to recognize the presumption in favor of the President's nominees); James Bennet, *225 Clinton Nominees Wait, and Some Will Wait Forever*, N.Y. TIMES, Oct. 9, 1998, at A18 (reporting that 225 Clinton nominees still awaited confirmation as the Senate prepared to adjourn in October 1998, as policy fights and ideology had stalled the nominations).

²⁶⁸ *See, e.g., Berke & Holmes, supra* note 221 (citing as examples the disputes over the confirmation of Bill Lann Lee to the top civil rights position and that of David Satcher to the Surgeon General's position); *see also* Eric Schmitt, *Nomination for F.D.A. Post Nears Approval in Senate*, N.Y. TIMES, Oct. 21, 1998, at A20 (reporting that conservative senators had held up the nomination of Dr. Jane Henney to head the Food and Drug Administration “[d]espite [her] seemingly unblemished record,” citing their concern that she might assume advocacy positions on issues such as abortion and tobacco).

²⁶⁹ *Berke & Holmes, supra* note 221 (reporting that Lee appeared to be “the ideal candidate: a well qualified, level-headed litigator, not a legal theorist,” but that his nomination had run aground after the conservative Institute for Justice launched a campaign against him).

Ambassador to Mexico²⁷⁰ being two prime examples—and a large number of President Clinton's judicial nominees have been blocked by Senate Republicans.²⁷¹ Moreover, as with NLRB nominations, these appointments have not been formally voted down either in committee or by the full Senate, but have simply not seen the light of day due to committee inaction²⁷² or senatorial holds.²⁷³

The Lee nomination is particularly illustrative of the overall change in norms.²⁷⁴ Lee is a career civil rights attorney²⁷⁵ whose nomination was endorsed

²⁷⁰ President Clinton's nomination of Weld was blocked by Jesse Helms, chair of the Senate Foreign Relations Committee. Katharine Q. Seelye, *With Iron Gavel, Helms Rejects Vote on Weld*, N.Y. TIMES, Sept. 13, 1997, at 1. Helms objected to Weld's "lax approach" towards drug policy. Katharine Q. Seelye, *Weld Ends Fight Over Nomination by Withdrawing*, N.Y. TIMES, Sept. 16, 1997, at 1. Helms refused to hold a hearing on the nomination, and Governor Weld subsequently withdrew his name from consideration after a five-month stalemate. *Id.*

²⁷¹ See Kline, *supra* note 105, at 247–55 (documenting this phenomenon in great detail); Neil A. Lewis, *Hatch Defends Senate Action on Judgeships*, N.Y. TIMES, Jan. 2, 1998, at A1 (reporting that the struggle between President Clinton and the Republican-controlled Senate over the appointment of federal judges had left many vacancies, prompting Chief Justice Rehnquist to criticize the Senate for its slow pace of confirmations and to comment that "delays were eroding the quality of justice"); John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. TIMES, Jan. 1, 1998, at A1 (reporting that Chief Justice Rehnquist had noted that the Senate had confirmed only 17 judges in 1996 and 36 in 1997, as compared to 101 in 1994); *id.* (reporting statement of Democratic Senator Patrick Leahy of Vermont that of seventy-eight judicial nominees presented to the 105th Congress as of the end of 1997, the Senate had confirmed only thirty-six nominations, and had left eight nominations pending on the Senate floor and thirty-four nominations pending in the Senate Judiciary Committee). See, e.g., Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1 (reporting that Senator Helms has blocked President Clinton's choices for two seats on the United States Court of Appeals for the Fourth Circuit). But see Lewis, *Hatch Defends Senate Action on Judgeships, supra* (noting that of seventy-eight vacancies as of December 1, 1997, no nomination had been made in thirty-seven cases).

²⁷² See Kline, *supra* note 105, at 250–51 (discussing judicial nominations); *supra* note 270 (discussing Weld nomination); *infra* notes 274–79 and accompanying text (discussing Lee nomination); see also Dan Carney, *Indicting the Courts: Congress' Feud with Judges*, C.Q. WEEKLY, June 20, 1998, at 1660, 1665 (noting that Senate Republicans' main strategy vis a vis judicial nominations has been to prevent them from even coming up for a floor vote and that "[i]f and when nominations do reach the floor . . . they usually pass with relative ease").

²⁷³ See, e.g., Kline, *supra* note 105, at 307–14 (discussing holds placed on numerous judicial nominations); *supra* notes 246 and 248 (discussing holds placed on NLRB nominations). The use of holds to block NLRB nominations is discussed further *infra* at text accompanying notes 308–17.

²⁷⁴ See *infra* text accompanying notes 275–79. But see *infra* note 279 (discussing the Republicans' contention that their blocking of the Lee nomination was no different than Democrats' treatment of certain Justice Department nominations during the Reagan administration).

by five former heads of the Civil Rights Division, including two Republicans,²⁷⁶ and whose views fall well within the Democratic mainstream. Nonetheless, the Republican-led Judiciary Committee refused either to vote on the nomination or to forward it to the full Senate,²⁷⁷ largely, it appeared, for the simple reason that

²⁷⁵ Lee worked for the NAACP Legal Defense and Education Fund (LDF Fund) in New York from 1974 to 1982, was supervising attorney for civil rights litigation at the Center for Law in the Public Interest in Los Angeles from 1983–88, and from 1989 until the time of his nomination was the LDF Fund's Western Regional Counsel. *President Clinton Appoints Lee as Acting Head of Civil Rights*, 1997 Daily Lab. Rep. (BNA) No. 241, at A-3, A-4 (Dec. 16, 1997).

²⁷⁶ *Senate Panel to Vote on Lee Nomination, but Opponents Likely to Win Committee Vote*, 1997 Daily Lab. Rep. (BNA) No. 219, at A-6, A-7 (Nov. 13, 1997). President Bush's Assistant Attorney General for Civil Rights described Lee as "superbly qualified" for the position. *Id.*

²⁷⁷ John M. Broder, *'Problems' Vowed on Rights Appointment*, N.Y. TIMES, Dec. 13, 1997, at A9 (reporting that the Senate Judiciary Committee led by Senator Hatch declined either to take a formal vote on Lee's nomination or to send it to the Senate floor for a vote by the full Senate). The President first threatened to give Lee a recess appointment, prompting Senator Hatch to warn that the President would face "all kinds of problems" if he made such an appointment. *Id.* Instead, Clinton then named Lee "Acting" Assistant Attorney General in charge of the Civil Rights Division. *President Clinton Appoints Lee as Acting Head of Civil Rights*, *supra* note 275, at A-3. Subsequently, he twice resubmitted Lee's nomination to the Senate. *White House Resubmits Lee, Igasaki Nominations to Senate*, 1998 Daily Lab. Rep. (BNA) No. 21, at A-11 (Feb. 2, 1998) (reporting resubmission of nomination); 145 CONG. REC. S2379 (daily ed. Mar. 5, 1999) (same). Thus far, the Senate has taken no action on Lee, and he remains in place in an "acting" capacity. See Nichole M. Christian, *Domino's Reaches Deal on Accusations of Bias*, N.Y. TIMES, June 7, 2000, at A28 (indicating that Lee continues to serve in acting capacity).

The President's grant of an "acting" appointment to Lee of course parallels his designation of Fred Feinstein as Acting General Counsel after it became apparent that Feinstein was unlikely to gain Senate confirmation to a second term. See *supra* note 152. The legality of both these "acting" appointments has been challenged. See Steven J. Duffield and James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 TEX. REV. L. & POL. 335, 338 (1998) (concluding that the designation of Lee as "Acting" Assistant Attorney General violates the Vacancies Act); *Employers Ask Reno to Seek Court Writ, Question Validity of Feinstein Appointment*, 1998 Daily Lab. Rep. (BNA) No. 178, at A-12 (Sept. 15, 1998) (reporting that two employers with ULP charges pending against them asked Attorney General to file a quo warranto suit alleging that Feinstein was unlawfully holding a federal public office). Indeed, the Congressional Research Service concluded that Lee's "acting" appointment violated the Vacancies Act, a statute that is intended to prevent Presidents from circumventing the confirmation process. *Clinton Justice Appointment Was Violation, Agency Says*, N.Y. TIMES, Jan. 18, 1998, at A23. Nonetheless, as of September 2000, Lee had been serving for over two and a half years in an "acting" capacity, and Feinstein served for an additional twenty months beyond his initial term, seven months in an "acting" capacity followed by an additional thirteen months as a recess appointee. See *President Clinton Appoints Lee as Acting Head of Civil Rights*, *supra* note 275, at A-3 (noting that Lee had assumed acting status in mid-December 1997); Christian, *supra* (noting Lee's continuing service in acting capacity as of June 2000); *supra* note 152 (noting that

Lee shares the views of the President on issues such as affirmative action²⁷⁸—views that are contrary to those of the Republican majority in the Senate.²⁷⁹

Just as the increased contentiousness over confirmation of NLRB appointees in recent years mirrors the overall trend in the appointments process, so too with the rise of packaged appointments. During the last several years,²⁸⁰ appointments

Feinstein had been appointed Acting General Counsel in March 1998, was given recess appointment in October 1998, and served through November 1999).

²⁷⁸ This was certainly the Clinton administration's party line on the nomination. See Berke & Holmes, *supra* note 221 (reporting that the President had urged the Judiciary Committee to approve the nomination, stating that "[i]t is wrong to deny this man that job because he agrees with the policies of his President on [the affirmative action] issue"); *White House Wavers Over Bill Lee as Hatch Blasts Idea of Recess Posting*, 1997 Daily Lab. Rep. (BNA) No. 236, at A-5, A-6 (Dec. 9, 1997) (reporting that Attorney General Janet Reno, in urging confirmation, stated that some are attempting to block the nomination because Lee shares the views of the President on affirmative action). Presidential Press Secretary Mike McCurry noted that Lee shared the President's views on civil rights and commented that, "[i]f Chairman Hatch believes that someone should follow the politics that he wishes to pronounce in the area of civil rights . . . then [he] should resign from the Senate, run for President, and he can name his own Assistant Attorney General for civil rights." Steven A. Holmes, *Senator Deals Serious Setback to Clinton Choice for Rights Job*, N.Y. TIMES, Nov. 5, 1997, at A16.

²⁷⁹ *Judiciary Democrats Block Vote on Lee for Justice Rights Position*, 1997 Daily Lab. Rep. (BNA) No. 220, at AA-1 (Nov. 14, 1997) (stating that the Republicans oppose Lee because of his views on affirmative action); *White House Wavers Over Bill Lee as Hatch Blasts Idea of Recess Posting*, *supra* note 278 (reporting that the nomination was blocked when a majority of Republicans on the Judiciary Committee expressed opposition because of Lee's support of affirmative action); see also Holmes, *Senator Deals Serious Setback to Clinton Choice for Rights Job*, *supra* note 278 (reporting that the Chair of the Senate Judiciary Committee, Orrin Hatch, stated that he had "the highest personal regard" for Lee, but had "deep philosophical differences" with him on affirmative action).

The Republicans, however, argued that the Democrats had done precisely the same thing when they blocked President Reagan's nominations of William Lucas to the same position and that of William Bradford Reynolds to be Associate Attorney General. See *White House Wavers Over Bill Lee as Hatch Blasts Idea of Recess Posting*, *supra* note 278 (reporting Senator Hatch's comments regarding the defeat of the Lucas and Reynolds nominations in the Democratic-controlled committee); see also *Judiciary Democrats Block Vote on Lee for Justice Rights Position*, *supra* (describing Hatch's response to the Democrats' call for the committee to forward the nomination to the full Senate without recommendation, in which Hatch states that the Democrats had blocked a Republican-supported attempt to do the same with the Lucas and Reynolds nominations).

²⁸⁰ President Clinton has obviously had more than his share of difficulties with the appointments process. See Kline, *supra* note 105, at 323 ("Court watchers believe this gridlock [on judicial nominations during the Clinton years] is unique."); Bennet, *supra* note 267 (reporting that 225 Clinton nominees still awaited confirmation as the Senate prepared to adjourn); Gottesman & Seidl, *supra* note 46, at 750 n.8 (discussing the ill-fated nominations of Zoe Baird and Kimba Wood to the Attorney General position and that of Lani Guinier to be Assistant Attorney General for Civil Rights). Some degree of difficulty was certainly to be expected, given that Clinton has faced Republican majorities in the Senate since the November 1994 elections. See Kline, *supra* note 105, at 248 n.4 (noting that Republicans held a 54-46

to agencies such as the Equal Employment Opportunity Commission (EEOC)²⁸¹ and the FCC²⁸² have followed much the same pattern as those to the Labor Board. Solo appointments are increasingly rare; instead, multiple vacancies have been allowed to accrue, at which point the slots have been filled through packaged nominations.²⁸³ Indeed, the packaging concept has even been introduced into the judicial nomination process; in May 1998, for instance, President Clinton let Republican Senator Slade Gorton select a nominee for the Ninth Circuit in exchange for the confirmation of a Clinton-chosen appointee whose nomination was being blocked by Gorton.²⁸⁴

edge in the 104th Congress of 1995–96, and have held a 55–45 majority in the 105th and 106th Congresses, covering 1997–98 and 1999–2000, respectively).

Nonetheless, some of Clinton's problems in getting his nominees confirmed are most likely of his own making. *See id.* at 315–16 (“The Clinton Administration routinely failed to react in a visible manner to much of the confirmation gridlock, quietly acquiescing to the Senate’s stripping of the President’s appointment privileges.”); *id.* at 318–20 (recounting commentators’ criticism of the President’s failure to assert himself in the area of judicial nominations); *id.* at 319 (recounting the comment of Bruce Fein, the Reagan Administration official in charge of judicial appointments, that the Senate was stalling “[b]ecause President Clinton himself has displayed gross disinterest in the judicial nomination process. . . . And if the President doesn’t push, it’s pretty easy to stop what’s goin’ on.”).

²⁸¹ *See Women’s Bureau Director Castro Heads Toward Expected Confirmation as EEOC Chair*, 1998 Daily Lab. Rep. (BNA) No. 185, at A-1 (Sept. 24, 1998) (reporting that the Castro nomination and the renomination of two sitting EEOC members were approved in a voice vote by the Senate Labor and Human Resources Committee); *Clinton to Name Incumbent Miller to New Term as EEOC Commissioner*, 1999 Daily Lab. Rep. (BNA) No. 98, at A-9 (May 21, 1999) (indicating that these three nominations were approved by the Senate at the same time); *see also Clinton Will Name Paul Miller to Second Term as Commissioner*, 1998 Daily Lab. Rep. (BNA) No. 121, at A-12 (June 24, 1998) (explaining that acting chair Paul Igasaki was currently serving as a recess appointee because his nomination to a full term had never been acted upon since it was tied to a potential nomination to a Republican seat that had ultimately failed).

²⁸² *See Seth Schiesel, At F.C.C. Confirmation Hearings, Emphasis Will Be on Competition*, N.Y. TIMES, Sept. 29, 1997, at D1 (reporting that four pending nominations to the FCC should be easily confirmed because the “essential politicking” had occurred before the nominations were even announced—one Republican nominee had been chosen by Republican Senator Trent Lott, the Majority Leader, and another by Republican Senator John McCain, chair of the Commerce Committee); *Senate Panel Endorses F.C.C. Nominees*, N.Y. TIMES, Oct. 9, 1997, at D21 (reporting that the four nominations were approved by the Senate Commerce Committee on a voice vote).

²⁸³ *See supra* notes 281–82 and accompanying text.

²⁸⁴ Neil A. Lewis, *Clinton Agrees to G.O.P. Deal on Judgeships*, N.Y. TIMES, May 5, 1998, at A1 (noting Clinton’s agreement to nominate Barbara Durham, a “prominent conservative” chosen by Republican Senator Slade Gorton of Washington, in return for the Republicans’ agreement to act on the nomination of Charles Fletcher, a friend of Clinton’s, which had been blocked for more than three years); *see also Kline, supra* note 105, at 302–04 (describing this “deal” in somewhat more elaborate terms). Rather ironically, after the deal had been struck and President Clinton’s choice quickly confirmed, the Gorton-sponsored nominee,

Packaging, of course, represents but one aspect of the shift toward greater senatorial control over the NLRB appointments process that I have traced out at some length above—a shift that has taken hold of the overall presidential appointments process with a vengeance in the last few years.²⁸⁵ This shift in the balance of power in the appointments process in favor of the Senate, I believe, *necessarily* leads to more extreme and more partisan nominees, for at least two reasons. The first has to do with the differing incentives of the President and any individual senator, and the second with the internal structure and rules of the Senate.

Presidents, much more so than individual senators, have a strong incentive to be moderate when it comes to NLRB appointments—as well as many other matters—regardless of party affiliation. Republican Presidents of course have a strong incentive to reward their core electoral supporters, the business

Barbara Durham, withdrew from consideration due to her husband's health problems. Neil A. Lewis, *A Nomination Is Withdrawn, and a Deal Is Threatened*, N.Y. TIMES, May 28, 1999, at A18.

The result of such packaging, as with NLRB nominations, *see supra* text accompanying note 196, has been the nomination of some judges whose views are actually antithetical to that of the President. *See, e.g.,* Lewis, *Clinton Agrees to G.O.P. Deal On Judgeships*, *supra* (reporting a comment made by a lawyer familiar with Durham's record that, "[t]his is not someone you would think could ever be named to a Federal appeals court seat by a Democratic President"); Kline, *supra* note 105, at 303 (describing Durham as "the anchor of the conservative faction" on the Washington Supreme Court) (internal citation omitted); Neil A. Lewis, *Environment and Politics Enter Debate on Judgeship*, N.Y. TIMES, May 9, 1999, at 16 (reporting that in order to get Senator Hatch to lift block on other judicial nominations, the President is contemplating nominating arch-conservative Ted Stewart to a district court seat even though Stewart is a "harsh critic of the President's land-use policies and politics" who has been described by the Natural Resources Defense Council as "Utah's version of James Watt," President Reagan's radically conservative Secretary of the Interior); 145 CONG. REC. S11919–20 (daily ed. Oct. 5, 1999) (reporting Stewart's confirmation); *cf.* Katharine Q. Seelye, *Gore Says Clinton Choice for Election Panel is 'Unfit' for Office*, N.Y. TIMES, Feb. 16, 2000, at A21 (reporting that to get Republicans to advance his judicial nominees, President Clinton has nominated Bradley Smith—whom Vice President, and presidential candidate, Gore opposes on the ground that "he is completely and totally opposed to the campaign finance laws" that he would be required to uphold—to a Republican seat on the Federal Election Commission); Lizette Alvarez, *Senate Ends Logjam, Confirming Election Official and Judges*, N.Y. TIMES, May 25, 2000, at A19 (reporting that Democrats agreed to confirm Smith in exchange for the Republicans' agreement to approve sixteen long-pending judicial nominations, prompting Senator McCain, co-author of campaign finance legislation, to complain that given Smith's advocacy of a repeal of campaign finance limits, "[s]ending Brad Smith to the F.E.C. is akin to confirming a conscientious objector to be secretary of defense").

²⁸⁵ *See* Mackenzie, *Starting Over*, *supra* note 215 (stating that the appointments process is now "Senate-driven," and commenting that it cannot accurately be called the *presidential* appointments process "[w]hen a senator can say of a nominee, 'he's not my kind of nominee,' and then decline even to permit a committee review of the president's choice"). Mackenzie calls 1997 "the single most significant year in the evolution of the modern appointment process." *Id.*

community, with pro-business appointments.²⁸⁶ Less obviously, however, they are also well-advised to take the interests of organized labor into account to at least some degree. The AFL-CIO remains a powerful force in national politics,²⁸⁷ and the President can accomplish more of his overall agenda if the AFL is kept—if not exactly happy, at least sufficiently neutralized to forego mounting all-out opposition to the administration's every initiative.²⁸⁸

Democratic Presidents, conversely, will want to reward their supporters in the labor community with pro-union Board appointments, but they also have an incentive to take the business community's interests into account to some extent.²⁸⁹ Labor Board appointments are only "a small part of the grand political game,"²⁹⁰ and a Democratic President can make more headway with his legislative agenda if he tosses an occasional bone to powerful business groups like the Chamber of Commerce and the National Association of Manufacturers, or at least manages to placate them sufficiently to avoid continual warfare on the many other fronts on which the administration is proceeding.

Senators, in comparison, have much less incentive to be moderate than does the President. This is in part a function of the difference in their respective constituencies. Whereas the President has a national constituency that is usually relatively heterogeneous, senators are tied to the narrower interests of their states.²⁹¹ This, in turn, tends to make them highly responsive to the appeals of special interest groups,²⁹² and in particular, to those interest groups that are especially powerful forces within their state or region.

Compounding the polarizing effect of senators' narrower constituencies and their resulting responsiveness to special interest groups are the Senate's internal structure and rules. The Senate operates in such a way as to cede an extraordinary

²⁸⁶ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 249.

²⁸⁷ See Steven Greenhouse & Katharine Q. Seelye, *Clinton Worked Hard for A.F.L.-C.I.O.'s Support of Gore*, N.Y. TIMES, Oct. 12, 1999, at A28 (emphasizing importance of AFL's endorsement in light of its thirteen million members and its ability to mobilize union members politically); see also Steven Greenhouse, *Unions Deny Stand Over Trade Policy is Protectionist*, N.Y. TIMES, Apr. 24, 2000, at A1 (characterizing the AFL-CIO, with its sixty-eight member unions, as "by far the most powerful voice" on trade issues, and recounting some of its successes in this area—such as blocking, for three years in a row, "fast-track" legislation that would have made it easier for the President to negotiate NAFTA-type free trade treaties with other nations).

²⁸⁸ Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 249 (stating that Republican Presidents know that it will be easier to pass their legislative programs "if prime movers in the labor movement, particularly the AFL-CIO, can somehow be co-opted or at least persuaded not to engage in active disruption.").

²⁸⁹ See *id.*

²⁹⁰ *Id.*

²⁹¹ Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 236–37 (1990) [hereinafter Moe, *Political Institutions*].

²⁹² *Id.*

degree of control over a wide range of issues—including nominations—to a relatively small number of senators, or even to an individual senator. Two means by which it does so, the committee system and the practice of senatorial “holds,” are particularly pertinent to the appointments process. Both these means, as we shall see below, have played a significant role in producing the more extreme Labor Board nominees of recent years.

The committee system is the rather ingenious mechanism that has evolved to enable each senator to reap the maximum possible political benefit (read “number of votes in the next election”) from his or her legislative activities.²⁹³ Just as every representative has a strong incentive to “vote his district,”²⁹⁴ so every senator has a strong incentive to vote the interests of his or her state. Those interests (and the corresponding interest groups whose mission it is to advance and protect them) vary tremendously from state to state, of course. Playing off this crucial fact, the committee system “allocates influence over policymaking in a manner that makes all legislators better off.”²⁹⁵ It does so in the following way.²⁹⁶

Committees have “near-monopoly jurisdiction” over a small set of issues.²⁹⁷ Senators are assigned to committees based at least in part on their preferences,²⁹⁸

²⁹³ See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 771 (1983), reprinted in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 30, 35 (Robert J. Mackay et al. eds., 1987) [hereinafter PUBLIC CHOICE AND REGULATION] (characterizing the committee system in this way); see also Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 1, 15 (to similar effect).

²⁹⁴ See Weingast & Moran, *supra* note 293, at 771, reprinted in PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35. See generally Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984).

²⁹⁵ Weingast & Moran, *supra* note 293, at 771, reprinted in PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35.

²⁹⁶ The following discussion is based largely on the analysis of Barry Weingast and Mark Moran. See Weingast & Moran, *supra* note 293, at 771–74, reprinted in PUBLIC CHOICE AND REGULATION, *supra* note 293, at 34–35. But see *infra* note 298 (discussing disagreement between Weingast and Moran and others over the degree to which “self-selection” actually drives committee assignments). Both their work and the other studies of the committee system discussed herein analyze that system in the context of the House of Representatives. See sources cited *supra* notes 293–94; *infra* note 298. I have transposed the analysis to the Senate context.

²⁹⁷ Weingast & Moran, *supra* note 293, at 771, reprinted in PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35.

²⁹⁸ There is some debate as to how much “self-selection”—i.e., the preferences of the member or senator—drives committee assignments. Weingast and Moran and others firmly believe that such “self-selection” drives the assignment process. Weingast & Moran, *supra* note 293, at 771, reprinted in PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35 (stating unequivocally that “members are assigned to committees on the basis of self-selection”); KENNETH A. SHEPSLE, *THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* 248 (1978) (to similar effect); see also Barry R. Weingast & William J.

and they are likely to seek assignments to those committees with jurisdiction over the issues most relevant to their constituents and key interest group supporters.²⁹⁹ In this way, each senator “gains greater leverage over precisely those issues relevant for his own political support and hence for re-election.”³⁰⁰ He does so, of course, by *giving up* influence over a whole host of issues that are of lesser concern to him but are of paramount concern to other members of the Senate, who naturally seek appointment to the committees with jurisdiction over *those* issues. In sum, “the committee system enforces the following trade: each

Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 150 (1988) (stating that according to their data, “overall . . . the pattern of committee assignments looks remarkably like an optimization process that maps members into those committees they value the most”). Gary Cox and Matthew McCubbins, however, conclude that the empirical evidence in support of this thesis is weak. GARY W. COX & MATTHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 24 (1993) (stating that while there is “substantial anecdotal evidence that members of Congress . . . seek committee assignments pertinent to their constituents’ interests . . . [and] good theoretical reasons to expect that they might,” statistical evidence in support of the “interest-seeking hypothesis” is relatively weak). In particular, Cox and McCubbins assert that “[t]he accommodation hypothesis—that members’ assignment requests are routinely granted—seems hard to maintain with the evidence at hand,” and that the self-selection hypothesis overlooks the influence that the desires of party leaders play in committee assignments. *Id.* at 20, 43. As noted, the studies cited all focus on the House of Representatives as opposed to the Senate. *See supra* note 296. In contrast, there does not seem to be any comparable recent work focusing on the Senate.

²⁹⁹ *See supra* note 298 (describing literature on “self-selection” and the “interest-seeking hypothesis”). While there is no data on the Senate Labor Committee, as to the House Education and Labor Committee, one study found that “interested” representatives—those whose constituencies might influence them to take a special interest in the issues before the committee—requested assignment to the committee over four times as often as did “indifferents”—representatives whose constituencies were unlikely to influence them in this direction. COX & MCCUBBINS, *supra* note 298, at 24–25 (describing 1973 study by Rohde and Shepsle). *But see id.* at 26 n.7 (concluding that, overall, the evidence as to whether constituency characteristics drive member requests for assignment to this committee is “mixed”).

³⁰⁰ Weingast & Moran, *supra* note 293, at 771, *reprinted in* PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35; *see also* Moe & Wilson, *supra* note 293, at 15 (stating that the committee system “enable[s] members to have disproportionate influence over issues of relevance to their own districts . . . and thus to realize gains from trade with their colleagues—all in the interest of reelection”); *see also, e.g.*, Joel Brinkley, *Surveying the Results, 20 Years and Millions of Dollars Later*, N.Y. TIMES, Oct. 23, 1999, at C4 (noting that Charles Schumer of New York—the nation’s banking and financial capital—was on the Banking Committee while in the House and is now on the Senate Banking Committee, and that in 1997 and 1998, Schumer received more money from the securities industry, which stood to be profoundly affected by recently-passed legislation under the committee’s jurisdiction, than anyone else now in the Senate).

legislator gives up some influence over many areas of policy in return for a much greater influence over the one that, for him, counts the most.”³⁰¹

A second senatorial practice³⁰² that enables an individual senator to exercise a disproportionate share of power over an issue—or nomination—that she or her constituency cares deeply about is that of the senatorial “hold”: a request to the Senate leadership to delay action on a particular matter, often backed up by a threat to mount a filibuster if the matter is allowed to go forward.³⁰³ Holds, which are secret,³⁰⁴ permit a single senator to block any action or nomination that she opposes for an indefinite period of time.³⁰⁵ To an even greater degree than the operation of the committee system, then, the Senate’s acquiescence in the use of holds evidences its “willingness . . . to mortgage its collective judgment to the whims of strongly motivated individual members.”³⁰⁶

The above analysis of senatorial incentives and of the Senate’s internal structure and rules goes a long way, I think, toward explaining why the Labor Board nominees produced by the increasingly Senate-driven appointments process of the last decade and a half—and in particular those from partisan backgrounds—have been significantly more extreme than those produced in the earlier, more presidentially-driven appointments era.

Turning first to the confirmation phase, the combination of senators’ incentives to cater to special interest groups that wield significant power within their state or region and the Senate’s increased willingness, in Calvin Mackenzie’s words, to “mortgage its collective judgment to the whims of strongly motivated individual members,”³⁰⁷ rather neatly explains the blocking of

³⁰¹ Weingast & Moran, *supra* note 293, at 771, *reprinted in* PUBLIC CHOICE AND REGULATION, *supra* note 293, at 35.

³⁰² “Holds” are not authorized by either law or formal Senate rule; they are “an informal procedure that has grown through accumulated practice.” Mackenzie, *Starting Over*, *supra* note 215.

³⁰³ *See id.*

³⁰⁴ That is, the identity of the senator placing the hold is kept secret unless the senator chooses to reveal herself. *Id. See, e.g.,* Philip Shenon, *Roadblock to Holbrooke’s U.N. Nomination Is Apparently Lott*, N.Y. TIMES, July 7, 1999, at A3 (noting that in accord with Senate practice, the Majority Leader had refused to identify the senators placing a hold on the nomination of Richard Holbrooke as ambassador to the United Nations). Senators Ron Wyden of Oregon and Charles Grassley of Iowa introduced legislation prohibiting secret holds in 1998. *See A Challenge to Senate Secrecy*, N.Y. TIMES, July 4, 1998, at A10; Mackenzie, *Starting Over*, *supra* note 215. That legislation was actually passed by the Senate, but “died a silent death in conference.” *Id.*

³⁰⁵ Mackenzie, *Starting Over*, *supra* note 215.

³⁰⁶ *Id.* (discussing the nomination of William Weld to be ambassador to Mexico, *see supra* note 270 and accompanying text, which was defeated almost single-handedly by Senator Jesse Helms).

³⁰⁷ *See supra* text accompanying note 306.

more than one moderate nominee in the late 1980s who would have been easily confirmed under the previous, highly deferential confirmation norm.

Both Presidents Reagan and Bush, for instance, attempted to place moderate Republican and career Board employee John Higgins on the Board, only to be thwarted by Senator Helms of North Carolina, doing the bidding of the National Right to Work Committee.³⁰⁸ While the Committee is too focused on a single issue and too right-wing to exert significant influence even over a conservative Republican President—Reagan included³⁰⁹—it is a powerful force to reckon with in a strongly anti-union textile state like North Carolina³¹⁰ and in the anti-union/“right-to-work” states of the South and West generally.³¹¹ Thus, when the Committee went on a rampage against Higgins, citing his “atrocious” record on “right to work” issues,³¹² Senator Helms was only too happy to oblige by first

³⁰⁸ See *supra* notes 243–46, 248 and accompanying text. While the Committee was virulently opposed to Higgins due to his “atrocious” record on “right to work” issues, the National Association of Manufacturers had no apparent complaints about Higgins, and former Nixon General Counsel and prominent management lawyer John Irving blasted the Committee for opposing an “experienced [and] knowledgeable” nominee who is “all that anyone should want” in a Board member. *Senate Labor Committee Expected to Consider Higgins’ Nomination Before the End of April*, *supra* note 165, at A-2.

³⁰⁹ The Committee is interested in a single issue: ensuring that employees in unionized bargaining units who choose not to join the union are not compelled to support the union financially—or at least that any such compelled contributions are kept to a minimum. This constellation of issues is referred to as “union-security” or “Beck” issues, with the latter term stemming from the Supreme Court’s decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (holding that objecting non-members cannot be compelled, over their objections, to support the “non-representational” activities of their union). Because of its single-minded focus, the Committee will oppose even the most conservative of nominees if their views on union-security issues are not to its liking. See *supra* note 116 (discussing how the Committee’s opposition effectively blocked the nomination of John Van de Water, a leader of well over a hundred anti-union campaigns during his pre-Board management consultant days, to a full term).

³¹⁰ See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 252 (noting that the most anti-union group within the business community is nonunionized small business, which is “led most vociferously by the textile industry”); David Firestone, *Union Victory at Plant in South Is Labor Milestone*, N.Y. TIMES, June 25, 1999, at A16 (stating that the textile industry is centered in the states of North Carolina, South Carolina and Virginia).

³¹¹ See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 273 (noting that the South and West are the most anti-union parts of the country). The states with “right to work” laws—i.e., laws prohibiting “union-security” arrangements between employers and unions that require all bargaining unit employees to support the union financially—are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. National Right to Work Legal Defense Fund, Inc., *Right to Work States, 1999* at <http://www.nrtw.org/rtws.htm> (last visited Aug. 16, 2000).

³¹² See *supra* note 308.

placing a hold on the nomination,³¹³ which had already been approved by the Senate Labor Committee,³¹⁴ in 1988,³¹⁵ and then by making it clear when President Bush assumed office that any attempt to revive Higgins's candidacy would be futile.³¹⁶ Similarly, President Bush's attempted renomination of Mary Miller Cracraft—a moderate Democrat who, like Higgins, had already been approved by the Senate Labor Committee—was blocked when Senator Wallop of Wyoming, also acting at the behest of the Right to Work Committee, placed a hold on the nomination and then simply ran out the clock.³¹⁷ Thus, acting solely on behalf of one right-wing interest group that has considerable power and influence in their respective home states and regions, Helms and Wallop were able, through the use of a “hold,” to single-handedly block perfectly moderate nominees who had won the approval of the committee with jurisdiction over the matter, and who would have sailed through the Senate in earlier times.

In recent years, however, it is the committee system rather than the use of holds that has been the major “culprit” in producing more extreme Labor Board nominees. At the confirmation phase, during the Clinton administration the Senate Labor Committee has become a virtual black hole for Labor Board nominations, however unobjectionable the nominee might have been under the “old rules.” Indeed, the more moderate the nominee (and hence the less objectionable under those rules), the greater has been the chance that the committee would either refuse to act on the nomination, or simply make clear in advance that the candidate was unacceptable.

³¹³ *Right-Wing Opposition Clouds Prospect for Confirmation of Higgins to NLRB Seat*, *supra* note 246 (stating that Helms had placed a hold on the nomination, which was opposed by the National Right to Work Committee). Senator Thurmond of South Carolina—another strongly anti-union textile state—also indicated that he had “concerns [about the nomination] that will be explored further.” *Id.*

³¹⁴ *Senate Labor Panel Approves Higgins' Nomination to NLRB*, 1988 Daily Lab. Rep. (BNA) No. 105, at A-8 (June 1, 1988).

³¹⁵ Following the hold, the Senate never voted on the nomination, effectively killing it. *See Johansen Announces Intention to Resign from NLRB by June 16*, 1989 Daily Lab. Rep. (BNA) No. 61, at A-9 (Mar. 31, 1989) (indicating that the Senate had failed to act on the Higgins nomination).

³¹⁶ *See supra* note 248.

³¹⁷ *See Karen Riley, Wallop Scuttles Cracraft for Another NLRB Term*, WASH. TIMES, Nov. 21, 1991, at C1; *White House Will Not Renominate Cracraft for Second Term on NLRB*, *supra* note 248. That is, Wallop kept the hold in place until the Senate had adjourned. *Id.* At that point, the President would have had to resubmit the nomination in order to keep it alive, which he elected not to do. *Id.*

Cracraft had earned the Right to Work Committee's eternal enmity by supporting the Board's submission in the *Beck* case, *see supra* note 309, of an amicus brief opposing a mandated rebate of dues used for “non-representational” purposes to objecting non-members covered by a union-security agreement. Riley, *supra*.

For instance, in 1993 and 1994 it informally rejected a series of moderate candidates proposed by the White House to fill a Republican seat on the Board, including an arbitrator and law professor who had served on New York's Public Employee Labor Relations Board, and the chief counsel to the Republicans on the Senate Judiciary Committee.³¹⁸ More recently, the committee simply sat for over a year on the 1998 nomination of John Truesdale, an exceedingly well-respected moderate and former Board member who had served the agency in a variety of capacities for more than forty years,³¹⁹ to a Democratic seat on the Board—approving and forwarding the nomination only when Truesdale indicated that he would step down upon the election of a new President, and when it further became clear that the alternative to Truesdale was the recess appointment of someone far more liberal.³²⁰

The Labor Committee's de facto refusal to confirm moderate Labor Board nominees, either by sitting on the nominations or informally vetoing them before

³¹⁸ *White House Names Professor Gould of Stanford University to Labor Board*, *supra* note 264, at A-5 (stating that "[t]he [open] Republican seat is expected to go to Eric J. Schmertz," an arbitrator and labor law professor at Hofstra University who had served as a member of the New York State Public Employee Relations Board and as New York City's Commissioner of Labor Relations); *Raudabaugh Faults Critics of Gould Nomination*, *NLRB Speed, Effectiveness*, 1993 Daily Lab. Rep. (BNA) No. 209, at A-8 (Nov. 1, 1993) (reporting outgoing Board Member Raudabaugh's statement that those under consideration for the Republican seat were Schmertz; Sharon Prost, minority chief counsel to the Senate Judiciary Committee; and Mary Harrington, director of labor relations for Eastman Kodak); *Senate and White House Continue Talks on Filling Vacancies at Labor Board*, *supra* note 253 (reporting that the White House had submitted names to Senate Republicans to fill the remaining vacancy on the Board, but that the Republicans "ha[d] rejected the White House candidates and insisted instead" on the appointment of their candidate, Eastman Kodak's Mary Harrington, who was "the unanimous choice of the business community"). The seat ultimately went to Charles Cohen. *See supra* note 258.

³¹⁹ *Board Officials Face Turning Points Regarding Continued Tenure in Office*, 1999 Daily Lab. Rep. (BNA) No. 208, at C-1 (Oct. 28, 1999) (noting that Truesdale, a "veteran board official who ha[d] served the agency for more than 40 years in a variety of positions," had been serving as a recess appointee because the committee had taken no action on his nomination, made over a year before); *Outgoing General Counsel Discusses 'Challenging, Terrific' Experience in Office*, *supra* note 228, at C-2 (recounting outgoing General Counsel Fred Feinstein's lament over the Senate's failure to act on Truesdale's nomination: "Who could be a more reasonable, acceptable kind of nominee?"). *See* Cindy Skrzycki, *For NLRB, an Improvement in Its Own Relations*, WASH. POST, Dec. 25, 1998, at B9 (reporting that spokesperson for the employer-side Labor Policy Association, which had been highly critical of outgoing Board chair William Gould, stated upon Truesdale's recess appointment and designation as chair that the Association had "nothing but nice things to say about Truesdale"); May 1999 EMPLOYMENT LAW ALERT, *supra* note 18 (stating that Truesdale's voting record during his previous terms on the Board "shines a beacon of reason above [the currently] partisan waters" at the Board).

³²⁰ *See Senate Confirms Truesdale as Member in Last-Minute Action Before Adjournment*, 1999 Daily Lab. Rep. (BNA) No. 225, at A-1 (Nov. 23, 1999).

they are even made, has obviously played a role in the production of more extreme Labor Board members. Even more critical in this regard, however, has been its intrusion in recent years into the *selection* phase of the process—an intrusion that has been accomplished by conditioning the approval of *any* Board nominee on the President's agreement to let the leaders of the committee, or of the Senate majority, select one or more other individuals for service on the Board.

That is, if the committee were simply blocking the President's first choice and forcing him to go to the second or third name on his "short list," the impact on the kind of person selected for service on the NLRB would not necessarily be all that profound. The White House presumably has several people in mind for any given appointment (to the Labor Board or anything else), and the difference between the President's first and third choices is likely to lie more in political considerations that have nothing to do with the NLRB than in any difference in the candidates' approaches to NLRA issues or likely voting records.³²¹ By holding all nominations hostage unless and until the committee or the Senate leadership is allowed to designate one or more appointees to complete a "package" of nominations, however, the committee virtually guarantees the appointment of Labor Board members who are likely to be considerably more one-sided in their voting than those appointed when the "old rules" held sway.

Under the old rules, as we have seen,³²² both sides played at least some role in the selection of any given Labor Board nominee; thus, each nominee was a person who—while by no means necessarily someone the "out group" would have chosen themselves—was at least someone they could live with. Moreover, the President played the dominant role in the selection process, both directly—by deciding who among those on the in group's short list would be elevated to the NLRB, and indirectly—by influencing the "in group" to refrain from loading up that list with excessively pro-labor or pro-management candidates.

Under the new regime, in contrast, and in particular during the Clinton years, the President has receded into the background, and a "you pick two, we pick two" mentality has taken over; instead of all concerned agreeing upon—or at a minimum acquiescing in—the appointment of a particular individual, the rival camps have simply divided up the pie between them: the President and/or key Senate Democrats pick one or more nominees, and key Senate Republicans pick one or more others.³²³

³²¹ See *supra* text accompanying notes 212–13 (describing how under the traditional "rules," the President made his choice from among the names on the short list based on factors such as the desire to gain a particular senator's support on some unrelated issue or perhaps racial or ethnic considerations).

³²² See *supra* text accompanying notes 207–13.

³²³ See *supra* note 258 and *infra* note 329 (stating that Cohen was picked at the insistence of Senate Republicans); *infra* notes 331–34 and accompanying text (describing how, in the 1997 package, Majority Leader Trent Lott selected the nominees to the Republican seats and Senator Kennedy secured a seat for his former aide Sarah Fox).

This new "system," such as it is, represents the triumph of the following view, advanced by the spokesman for a prominent employer-side organization:³²⁴

Let us recognize reality. Labor law is a dichotomous world. Labor lawyers represent either management or labor, and they tend to share the sentiments of their clients on labor-management issues. . . . If the Board is to be filled with individuals who have expertise in the labor laws, there is no avoiding the necessity to draw from pools of individuals who have views on the law which can generally be classified [as] pro-labor or pro-management.

The current system ignores this reality [I]t pretends to seek candidates who are "acceptable to all sides." Of course, as soon as someone is drawn from either the labor or the management pool, that individual is almost by definition unacceptable to the other side

A healthier approach may be to acknowledge that Board members can only be drawn from the two camps and let each camp suggest its own candidate. . . . [W]ith a Democrat in the White House, the labor camp will get three picks and, with [a] Republican[] [president], management gets three.³²⁵

The type of nominee likely to emerge—and that has emerged—from such a process is obviously very different than the type of person likely to emerge, and that did emerge, under the pre-1980 rules of the game. Indeed, this practice of "packaging" nominations, and of permitting each side to choose "its" Board-member(s)-to-be with little or no regard for the wishes or preferences of the other side is, in my view, the one factor more responsible than any other for the emergence of the "new breed" of highly partisan management and union-side Board appointees that we have seen in recent years.

On a purely theoretical level, it seems clear that once the two sides abandon any effort to reach some sort of agreement on any given Labor Board nominee and simply apportion the number of slots to be filled between them, the result be will the selection of Board members who tilt strongly toward one side or the other. Instead of the "in group" looking for a "respected professional[]" who is "moderately conservative" (when the Republicans hold the White House) or "moderately liberal" (when the Democrats and organized labor are doing the choosing)³²⁶ and who will pass muster both with the other side and with the President, packaging gives each side an incentive to search for someone who can be counted on to vote in their favor and to cancel out the vote of whomever the opposition chooses. Board members chosen under such a system, moreover, having been hand-picked by one side or the other, can hardly help but view

³²⁴ That organization is the Labor Policy Association, which represents the interests of 240 major corporations. AGENCY IN CRISIS, *supra* note 3, at 2.

³²⁵ *Id.* at 50.

³²⁶ See *supra* text accompanying note 211.

themselves as having a constituency—as being representatives not of the general public,³²⁷ but of either the labor or management-side community.³²⁸

And indeed, the theory has been borne out in practice. No one, I think it is fair to say, had any illusions about the “impartiality” of a number of Board members chosen to fill particular slots in the Clinton-sanctioned packages of recent years; the management lawyer chosen by Senator Kassebaum to fill a Republican seat in 1994³²⁹ was pronounced “an ideal candidate” by the Chamber of Commerce,³³⁰ and the two “GOP hard-liners” hand-picked by Senate Majority Leader Trent Lott in 1997³³¹ were happily deemed “very pro-management” by another major employer group.³³² While the Democrats may not (perhaps

³²⁷ See *Hearings on S. 1958*, *supra* note 10, reprinted in 2 NLRB, LEG. HIST. OF THE NLRA, *supra* note 10, at 1617, 1677 (indicating that consensus emerged during the drafting of the NLRA that all Board members should represent the general public).

³²⁸ Interestingly, Member Peter Hurtgen, who had spent over thirty years on the management side before being appointed to the Board as part of the 1997 package, recently made a reference to the various Board members’ “constituents.” See *NLRB Heads into 2000 with Improved Budget, Full Board, New General Counsel*, *supra* note 265, at S-8 (stating that the longer the current Board members get to work together, “the better the results are going to be for our constituents”).

³²⁹ See *White House Appointment of Cohen to NLRB is Expected to Bring Board to Full Strength*, *supra* note 148 (describing how Kassebaum, the ranking Republican on the Senate Labor and Human Resources Committee, led the drive to find a candidate acceptable to the Republicans, and lauded ultimate nominee Charles Cohen as “a fine choice”); see also *supra* note 41 (explaining the custom that a fully-staffed Board be made up of three members of the President’s party and two from the other party).

³³⁰ *White House Appointment of Cohen to NLRB is Expected to Bring Board to Full Strength*, *supra* note 148; see also *The Voting Records of the Members of the National Labor Relations Board*, EMPLOYMENT LAW ALERT (Nixon, Hargrave, Devans & Doyle LLP) Dec. 1995 at 7 [hereinafter December 1995 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*) (noting that “Member Cohen, as expected, is solidly on the side of the employer”).

³³¹ Bernstein, *How Business is Winning its War with the NLRB*, *supra* note 93 (reporting that Lott struck a deal with the White House and Senator Edward Kennedy in which Lott got “two GOP-hard-liners” on the Board, while Kennedy’s support was secured by an agreement to appoint former Kennedy aide Sarah Fox.)

³³² *Id.* (recounting comments of a spokesperson for the American Trucking Association). It was not only the Republican opposition and its constituent interest groups that were insisting upon particular candidates during the Clinton years; Democratic power brokers, such as Senator Edward Kennedy, made their own demands on the President. See *id.* (stating that the 1997 package deal received the support of Senator Kennedy only after the Republicans had agreed to the nomination of former Kennedy aide Sarah Fox). As a result, the nomination process at times appeared so Senate-driven as to make the President—his article II power notwithstanding—appear a mere spectator to the whole affair. *Id.* (reporting that the “White House went along” with the deal brokered by Majority Leader Trent Lott and Senator Kennedy).

counter-intuitively, given their hold on the White House)³³³ have made out quite as well, certainly the management side expected few votes in their favor from former union attorney and Kennedy aide Sarah Fox, for instance; however, secure in the knowledge that the votes of "their" two picks would cancel out those of Fox and former union attorney Wilma Liebman, they acquiesced in Fox's inclusion in the 1997 package.³³⁴

³³³ But see Kline, *supra* note 105, at 247–55 (noting President Clinton's weakness in the appointments process vis-a-vis the Republican-controlled Senate).

³³⁴ The Republicans appeared staunchly opposed to Fox's appointment when her name was originally floated for a Board seat in late 1994/early 1995. See *Sen. Kassebaum: A Moderate Reformer Charts New Course for Labor Committee*, *supra* note 253 (reporting that Senator Kassebaum, chair of the Senate Labor and Human Resources Committee, predicted "very rough sledding to get confirmation" for Fox, should she be formally nominated); *White House Gives Sarah Fox Recess Appointment to Labor Board*, *supra* note 151 (reporting that the President gave Fox a recess appointment in order to "[c]ircumvent[] a possible bitter confirmation fight"); *NLRB Member Cohen Plans to Leave Aug. 27, Administration Seeks Republican to Fill Seat*, 1996 Daily Lab. Rep. (BNA) No. 120, at A-10 (June 21, 1996) (reporting that the recess appointment of Fox was made over the "strong opposition of business groups").

However, organized labor and the Clinton administration persisted in making Fox's appointment to a full term a "key priority," and the business community ultimately acquiesced in her inclusion in the package of four appointments in late 1997. *White House Seeks Republican Input on Plans to Fill Four Vacancies at NLRB*, *supra* note 165 (reporting that Fox's appointment to a full term was a "key priority" and the "linchpin" of any deal); Bernstein, *How Business is Winning its War with the NLRB*, *supra* note 93 (stating that Fox's appointment was the "big concession to the Democrats" in the 1997 package).

As to whether the business community's initial fear or adamant opposition to a Fox appointment was warranted, when Fox was a recess appointee awaiting confirmation to a full term, her voting record was reasonably moderate—much more so, for instance, than former union attorney Margaret Browning's had been. April 1998 EMPLOYMENT LAW ALERT, *supra* note 18 (indicating that as of November 8, 1997, just prior to her confirmation to a full term, Fox's voting record in disputed cases was 29–11, or 73%, in favor of the union position, and commenting that Fox "ha[d] quietly compiled a much more moderate voting record than the late Margaret Browning"). This pattern more or less held during the first several months following Fox's confirmation to a full term, but from that point on she voted the pro-union line in nearly every single disputed case; quite remarkably, during the last two years tracked by the *Employment Law Alert*, she has compiled a 174–1 pro-union voting record in disputed cases. Compare January 1999 EMPLOYMENT LAW ALERT, *supra* note 121 (reporting that Fox's record from her confirmation to full term in November 1997 through late August 1998 was 47–14 or 77% pro-union in disputed cases), with May 1999 EMPLOYMENT LAW ALERT, *supra* note 18 (reporting that Fox compiled a 41–0 pro-union voting record from August 27 through December 31, 1998), December 1999 EMPLOYMENT LAW ALERT, *supra* note 19 (reporting that Fox had a 35–0 pro-union voting record in disputed cases during the first five months of 1999), May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (reporting that Fox voted for the union position in 49 of 49 disputed cases during the last seven months of 1999), and January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178 (reporting that Fox had compiled a 49–1 pro-union record during the first seven months of 2000, and noting that her "amazing string" of 173 straight pro-union votes had come to an end on July 24, 2000).

The voting records of these package-produced Board members, moreover, has been very much what one would expect. As the *Employment Law Alert* stated, speaking of the products of the 1997 package, "[I]t should be no surprise" that ex-management lawyers Hurtgen and Brame are near the top (for the period 1985 onward) in the percentage of votes cast for the employer position and ex-union lawyers Fox and Liebman are near the bottom, given that they are the products of a system in which "employers and unions are both demanding that each side's partisans be appointed to the Board."³³⁵ Indeed, one increasingly begins to feel that these four members may as well simply call their votes in; Member Hurtgen had a "perfect" 61-0 pro-management record during the tenure of Chairman William Gould,³³⁶ while Member Fox, as noted previously, at one point had a 173-0 pro-union streak going.³³⁷ Matters have reached such a pass that the *Employment Law Alert* recently stated: "When we referred to a 'partisan' NLRB, we were not kidding. The votes for the 'other' side's position are so few and far between, we will list them for avid Board-watchers."³³⁸

And while the products of the most recent package deal have, as a group, been the most egregiously partisan of all,³³⁹ they have certainly had some

³³⁵ January 1999 EMPLOYMENT LAW ALERT, *supra* note 121; *see also* April 1998 EMPLOYMENT LAW ALERT, *supra* note 18 (noting that "recent [Board] appointees [have begun] to act and vote like the interest groups that sponsored their appointments . . . resulting in an unprecedented polarization of views").

³³⁶ January 1999 EMPLOYMENT LAW ALERT, *supra* note 121; *see also* May 1999 EMPLOYMENT LAW ALERT, *supra* note 18 (noting that "Hurtgen's perfect record of never voting for the union [had gone] by the boards" when he cast one vote for the union position—as against thirty-two for the management position—in the four-month period following Gould's departure).

³³⁷ *See supra* text accompanying note 195. As noted *supra* note 19, as this article goes to press Member Brame's term had recently expired, and the recess appointment that Member Fox had received upon the expiration of her term was set to expire shortly.

³³⁸ December 1999 EMPLOYMENT LAW ALERT, *supra* note 19. In the five-month period tracked in that issue, Member Hurtgen had a 29-1 pro-management voting record, Member Brame had a 22-3 pro-management record, and Members Liebman and Fox had 36-1 and 35-0 pro-union records, respectively. *Id.* Only Chairman John Truesdale showed any sign of objectivity, voting for the union position in nine cases, and for the management position in five. *Id.*

This pattern only continued. In the following seven-month period, Member Hurtgen had a 47-1 pro-management record, Member Brame a 38-4 pro-management record, and Members Liebman and Fox had 45-1 and 49-0 pro-union records, respectively. May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (reporting these "astonishing results"). Chairman Truesdale, for his part, compiled a 43-8 pro-union record during this period. *Id.* Finally, in the last seven-month period tracked, Member Hurtgen compiled a 37-4 pro-management record, Member Brame a 26-4 pro-management record, and Members Liebman and Fox 34-1 and 49-1 pro-union records, respectively, while Chairman Truesdale had a 16-5 pro-union record. *See* January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178.

³³⁹ May 2000 EMPLOYMENT LAW ALERT, *supra* note 178 (characterizing the partisan differences among the current Board members as "unprecedented"); May 1999 EMPLOYMENT

competition in this respect from some of their predecessors, most notably ex-union attorney Margaret Browning and former management lawyer Charles Cohen, both part of the 1993-94 package of appointments.³⁴⁰ In disputed cases, "Member Browning's vote . . . invariably favored the union and Member Cohen's the employer,"³⁴¹ and Browning takes the prize for the most pro-union Board member overall, having voted for the union's position 98% of the time.³⁴²

LAW ALERT, *supra* note 18 ("The Board has never witnessed such extreme partisanship between the two opposing political camps as now exists."); *see also* January 1999 EMPLOYMENT LAW ALERT, *supra* note 121 (referring to the "sharp partisan differences" on the Board staffed by these four members and chaired by Stanford law professor William Gould); April 1998 EMPLOYMENT LAW ALERT, *supra* note 18 (referring to the "unprecedented polarization of views" on the Hurtgen/Brame/Fox/Liebman/Gould Board).

³⁴⁰ *See supra* note 264.

³⁴¹ *The Voting Records of the Members of the NLRB*, EMPLOYMENT LAW ALERT (Nixon, Hargrave, Devans & Doyle LLP) Mar. 1997 [hereinafter March 1997 EMPLOYMENT LAW ALERT] (newsletter on file with the *Ohio State Law Journal*); *see also id.* (stating that "[t]he Cohen-Browning disparity is so pronounced that the solitary vote cast by Member Cohen for the 'other side' [during an eight-month period in which Cohen compiled a 27-1 pro-employer voting record and Browning a 30-0 pro-union record] must be mentioned").

³⁴² January 2001 EMPLOYMENT LAW ALERT (advance copy), *supra* note 178 (indicating that Browning's percentage of pro-union votes, 98%, was the highest in the fifteen-year period covered by the survey); *see also* January 1999 EMPLOYMENT LAW ALERT, *supra* note 121 (stating that "Browning, an avid union partisan before and during her Board term, voted for the employer's position [only] twice" in her entire term); December 1995 EMPLOYMENT LAW ALERT, *supra* note 330, at 6-7 (noting Browning's "party-line voting record," which has caused "[s]ome commentators [to] claim [that] Browning follows a strict AFL-CIO agenda").

A year and a half into Browning's term, the *Employment Law Alert* noted her "amazingly consistent pro-union voting record" and stated that: "Member Browning has actually cast more pro-union votes than the legendary Donald Dotson cast for employers. No one would have dreamed that was possible." December 1995 EMPLOYMENT LAW ALERT, *supra* note 330, at 7; *see also* March 1997 EMPLOYMENT LAW ALERT, *supra* note 341 (noting with similar amazement that Browning's percentage of pro-union votes [98%] "actually exceeds the pro-employer voting record compiled by former Board Chair Donald Dotson). Browning maintained her "amazing[] consisten[cy]" to the very end of her Board service, finishing with a 97-2, or 98%, pro-union voting record. April 1998 EMPLOYMENT LAW ALERT, *supra* note 18.

Member Cohen's overall voting record was at least slightly less partisan; he finished with an 88% (86-12) pro-management record. *See* March 1997 EMPLOYMENT LAW ALERT, *supra* note 341. Interestingly, however, much as Member Fox had cast at least a modest number of votes for the employer position during the several months both preceding and following her confirmation to a full term before turning into a completely unabashed union partisan, Cohen compiled a solid, but not remarkable, pro-management record during his first eighteen months on the Board, but turned into a complete "party-line" voter after that point. *Compare* December 1995 EMPLOYMENT LAW ALERT, *supra* note 330, at 7 (reporting that Cohen had a 37-10 pro-employer record [79%] as of August 1995), *with* March 1997 EMPLOYMENT LAW ALERT, *supra* note 341 (reporting that Cohen finished his term in August 1996 with an 86-12 pro-management record, indicating that he voted for the management position in 49 out of 51, or 96%, of disputed cases during his last year on the Board); *see also supra* note 334 (noting that Fox had voted for the union position 73% of the time in the period preceding her confirmation

Finally, as a purely statistical matter, five of the six most pro-management Board members covered by the *Employment Law Alert* study were products of a package deal, as were all three of the most pro-union members.³⁴³

Not surprisingly, moreover, these five exceedingly pro-management Board members were all former management lawyers, and the three extreme union partisans all former union attorneys.³⁴⁴ If, after all, one is looking for a reliable vote in favor of either the union or management-side position—someone who can be counted on to vote the party line and cancel out the vote of the opposition's designee—where better to turn than to a long-time representative of labor or of management?

Of course, in the pre-1980 period, as I have discussed at some length,³⁴⁵ the management lawyers selected (there were no representatives from the union side) were typically strongly pro-management in their voting, but they were hardly so completely predictable in the way that the recent appointees from the management and union sides have been. Thus, the selection of individuals who have worked one side of the fence or the other does not *inevitably*, it seems, have to result in utterly unabashed partisan voting—at least when the President is doing the choosing, and both sides have some say in the selection of any given Board member.

Given the change in appointment norms over the past fifteen to twenty years, however, and in particular the significant shift toward greater senatorial control of that process in recent years, such “phone-it-in,” party-line voting by the union and management-side lawyers chosen for service on the Board becomes, if not wholly inevitable, entirely unsurprising. Once we have senators, with their narrower constituencies and greater responsiveness to interest group pressures, in control of the selection process—and once the two sides decide simply to divide up the available Board seats between them—the logical outcome is the selection not of “moderately conservative” or “moderately liberal” lawyers,³⁴⁶ whether from government or private practice—but of *de facto* representatives of the Chamber of

and 77% of the time in the several months following her confirmation, but in the last two years tracked had voted for the union position in 174 out of 175 cases).

³⁴³ See *supra* Table 2, p. 1408 (indicating that the most pro-management members, in order, are Dotson, Hurtgen, Brame, Cohen, Oviatt, and Raudabaugh, and that the most pro-union members, in order, are Browning, Liebman, and Fox); *supra* notes 261 and 264–65 and accompanying text (indicating that all except Dotson were products of package deals). The one exception here—Donald Dotson—was the highly ideological chairman of the infamous Reagan Board I. See *supra* notes 103–04, 191 and accompanying text.

³⁴⁴ See *supra* Table 2, p. 1408 (indicating that Hurtgen, Brame, Cohen, Oviatt, and Raudabaugh are all former management lawyers, while Browning, Liebman, and Fox are all former union lawyers).

³⁴⁵ See *supra* text accompanying notes 182–83.

³⁴⁶ See Moe, *Interests, Institutions and Positive Theory*, *supra* note 24, at 259.

Commerce³⁴⁷ or AFL-CIO³⁴⁸ point of view, who are most likely to be found working their chosen side of the fence.

To return to my version of the judicial analogy set forth earlier,³⁴⁹ it is as if the members of a Supreme Court that hears only criminal procedure cases were all hand-picked, not by the President in consultation with both the criminal defense and the prosecutors' bar, but by the members of those bars and their respective legislative allies, with one side getting five picks and the other side four.³⁵⁰ In such a world, both the defense and prosecution sides are highly likely not only to turn to members of their own club as opposed to lower-court judges or government officials, but to utterly and completely *reliable* members—to those who can be counted upon to support the defense or prosecution party line come hell or high water. And so it is with the NLRB today.

CODA: A RETURN TO THE ROAD NOT TAKEN

In the wake of the numerous partisan appointments of recent years, the National Labor Relations Board has now come 180 degrees from its origins. At the close of the twentieth century, the Board was split between two ex-management lawyers on the one hand and two former union lawyers on the other, flanking first former law professor William Gould³⁵¹ and then career Board employee John Truesdale³⁵² as chair and swing vote. To the extent

³⁴⁷ See *supra* text accompanying note 330 (reporting that Board-member designate and long-time management lawyer Charles Cohen had been pronounced "an ideal candidate" by the Chamber).

³⁴⁸ See *supra* note 342 (reporting that Board Member Margaret Browning, a career union attorney, is said to vote the AFL-CIO "party line").

³⁴⁹ See *supra* text accompanying note 172.

³⁵⁰ Cf. AGENCY IN CRISIS, *supra* note 3, at 50 ("[W]ith a Democrat in the White House, the labor camp will get three picks, and with [a] Republican[] [president], management gets three.").

³⁵¹ See May 1999 EMPLOYMENT LAW ALERT, *supra* note 19 (reporting that in 1997–98, Stanford law professor William Gould presided over a Board "split down the middle" between ex-management lawyers J. Robert Brame and Peter Hurtgen and former union attorneys Sarah Fox and Wilma Liebman); April 1998 EMPLOYMENT LAW ALERT, *supra* note 18 (stating that Gould was bound to be the deciding vote, given the sharp split between the other four Board members); *supra* Table 2, p. 1408 (indicating that Gould's voting record falls between the extremely pro-management records of Hurtgen and Brame and the extremely pro-union records of Fox and Liebman).

³⁵² See May 1999 EMPLOYMENT LAW ALERT, *supra* note 19 (stating that "[t]he Board has never witnessed such extreme partisanship between the two opposing political camps as now exists," and that Truesdale will be the "pivotal swing vote[]"); December 1999 EMPLOYMENT LAW ALERT, *supra* note 19 (stating that Truesdale presides over a "fractured agency" that is "split down the middle on partisan lines" between ex-management lawyers Hurtgen and Brame on the one hand and ex-union lawyers Fox and Liebman on the other); see also January 2001

that such a Board looks very much like a body composed of two members “designated as representatives of employers, two as representatives of employees, and [one] as representative[] of the general public,”³⁵³ it is, of course, precisely the type of tripartite agency that the Congress that brought the Board into being quite consciously elected not to create.³⁵⁴

As contrary as the current incarnation of the NLRB is to the body of impartialists that the Wagner Act Congress had in mind, however, I would not go so far as to suggest that the Board as presently constituted is statutorily invalid. Much has changed since 1935—not least our degree of faith in (or even belief in the concept of) “neutral experts”—and as a practical matter, the appointment of an individual who at least *swears* to represent the public interest and no other while on the NLRB—however unlikely or unrealistic that may appear in light of the nominee’s background—is presumably enough to satisfy the statute.

Nor do I harbor all that much hope of a “voluntary” (i.e., norm-driven) return to an earlier, “purer” era of NLRB appointments. Certainly the practice of appointing management and union-side representatives to the Board has become so well-entrenched as to make any reversion to the impartiality standard of the Act’s early years all but inconceivable. As to the prospects of an abandonment, at least, of the “you pick two, we pick two” mentality that has done so much to produce near-party line voting at the Board in recent years and of a return to the days of less blatantly biased or one-sided NLRB nominees, I am more equivocal. The changes that have overtaken the NLRB appointments process over the last decade and a half largely mirror those that have taken place in the presidential appointments process generally. The likelihood of a return to prior norms,

EMPLOYMENT LAW ALERT (advance copy), *supra* note 178 (verifying Truesdale’s “swing vote” status, exemplified by the fact that Truesdale has been in the majority in 98 of 100 cases in which at least one Board member dissented); *see also supra* note 338 (indicating that in the last nineteen months tracked, Members Hurtgen and Brame had compiled 113–6 and 86–11 pro-management voting records, respectively, and Members Liebman and Fox had compiled 115–3 and 133–1 pro-union records, respectively, whereas Truesdale had a more balanced record of 68–18 pro-union).

As this article goes to press, the term of one of the management lawyers had recently expired, and the recess appointment granted to one of the union lawyers following expiration of her term was set to expire shortly. *See supra* note 19. Thus, absent relatively quick action, the century could end with careerist Truesdale chairing and acting as swing vote on a three-member Board split between a single ex-management lawyer and a single ex-union lawyer.

³⁵³ S. 2926, 73d Cong. § 201 (1934), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 4 (setting forth text of the original bill introduced by Senator Wagner); *see also supra* text accompanying note 7 (same). Senator Wagner’s original legislation obviously equated the interests of employees with those of unions. *See* S. 2926, 73d Cong. § 201 (1934), *reprinted in* 1 LEG. HIST. OF THE NLRA, *supra* note 1, at 4.

³⁵⁴ *See supra* text accompanying notes 5–12 (recounting how the Wagner Act Congress rejected a tripartite model of the agency, represented by the predecessor body to the NLRB and proposed in the original legislation, and instead determined that all Board members should be impartial and represent the public interest only).

therefore, appears to depend chiefly on larger political trends—the directions of which only a fool would attempt to predict.

APPENDIX

The Members of the National Labor Relations Board, 1935–2000³⁵⁵

Name	Background	Appointed By
1. Edwin Smith (1935–41)	Government	Roosevelt
2. Warren Madden (1935–40)	Academia	Roosevelt
3. John Carmody (1935–36)	Government	Roosevelt
4. Donald Smith (1936–39)	Law (Gen'l)	Roosevelt
5. William Leiserson (1939–43)	Academia	Roosevelt
6. Harry Millis (1940–45)	Academia	Roosevelt
7. Gerard Reilly (1941–46)	Government	Roosevelt
8. John Houston (1943–53)	Government	Roosevelt
9. Paul Herzog (1945–53)	Government	Truman
10. James Reynolds (1946–51)	Government	Truman
11. Abe Murdock (1947–57)	Government	Truman
12. Copeland Gray (1947–49)	Mgt. (IR)	Truman
13. Paul Styles (1950–53)	Government	Truman
14. Ivar Peterson (1952–56)	Government	Truman
15. Guy Farmer (1953–55)	Mgt. Lawyer	Eisenhower
16. Philip Ray Rodgers (1953–55)	Government	Eisenhower
17. Albert Beeson (Mar.–Dec. 1954)	Mgt. (IR)	Eisenhower
18. Boyd Leedom (1955–64)	Government	Eisenhower
19. Stephen Bean (1955–60)	Government	Eisenhower
20. Joseph Jenkins (1957–61)	Mgt. Lawyer	Eisenhower
21. John Fanning (1957–82)	Government	Eisenhower
22. Arthur Kimball (1960–61)	Government	Eisenhower

³⁵⁵ Key: IR = Industrial Relations; * = “repeat” appointee. As a general matter, the background listed for each Board member is the member’s “primary occupation” before appointment to the Board—i.e., the occupation in which the Board member had spent more of his or her recent working life than any other. *See supra* note 102 (distinguishing between “primary occupation” and “prior occupation”—i.e., occupation just prior to appointment). The designations for three members, however, merit brief explanations. First, I have listed Howard Jenkins (1963–83) as “Academic/Government” because his pre-Board career was split nearly evenly between the two. *See Flynn, supra* note 91, at 529–30 n.256 (describing Jenkins’s career). Second, the “Management/Union Lawyer” designation for Betty Murphy (1975–79) refers to the fact that Murphy worked for an unusual law firm that represented several international unions as well as numerous management clients. *See supra* note 89. Third and finally, Copeland Gray (1947–49) is designated as “Management (Industrial Relations)” as he indeed came from such a background. *See supra* note 26. However, I have not listed Gray in bold-face, as I did with the other management-side representatives to highlight the partisan character of those appointments, for the following reason: Gray was so ignorant of the new Taft-Hartley amendments as to arouse suspicion that President Truman had appointed him in order to *thwart* effective enforcement of those amendments, which of course were favored by management. *Id.*; *see also supra* note 147. Hence, I would not classify Gray as a “partisan” appointment.

23.	Frank McCulloch (1961–70)	Government	Kennedy
24.	Gerald Brown (1961–71)	Government	Kennedy
25.	Howard Jenkins (1963–83)	Acad./Govt.	Kennedy
26.	Sam Zagoria (1965–69)	Government	Johnson
27.	Edward Miller (1970–74)	Mgt. Lawyer	Nixon
28.	Ralph Kennedy (1970–75)	Government	Nixon
29.	John Penello (1972–81)	Government	Nixon
30.	Betty Murphy (1975–79)	Mgt./U Lawyer	Ford
31.	Peter Walther (1975–77)	Mgt. Lawyer	Ford
32.	John Truesdale (1977–81)	Government	Carter
33.	Don Zimmerman (1980–84)	Government	Carter
34.	Robert Hunter (1981–85)	Government	Reagan
35.	John Van de Water (1981–82)	Mgt. Consultant	Reagan
36.	John Miller (1982–83)	Government	Reagan
37.	Donald Dotson (1983–87)	Mgt. (in-house)	Reagan
38.	Patricia Diaz Dennis (1983–86)	Mgt. (in-house)	Reagan
39.	Wilford Johansen (1985–89)	Government	Reagan
40.	Marshall Babson (1985–88)	Mgt. Lawyer	Reagan
41.	James Stephens (1985–95)	Government	Reagan
42.	Mary Cracraft (1986–91)	Mgt. Lawyer	Reagan
43.	John Higgins (1988–89)	Government	Reagan
44.	Dennis Devaney (1988–94)	Government	Reagan
45.	Clifford Oviatt (1990–93)	Mgt. Lawyer	Bush
46.	John Raudabaugh (1990–93)	Mgt. Lawyer	Bush
47.	John Truesdale* (Jan.–Mar. 1994)	Government	Clinton
48.	William Gould (1994–98)	Academia	Clinton
49.	Margaret Browning (1994–97)	Union Lawyer	Clinton
50.	Charles Cohen (1994–96)	Mgt. Lawyer	Clinton
51.	John Truesdale* (1994–96)	Government	Clinton
52.	John Higgins* (1996–97)	Government	Clinton
53.	Sarah Fox (1995–___)	Union Lawyer	Clinton
54.	Wilma Liebman (1997–___)	Union Lawyer	Clinton
55.	J. Robert Brame (1997–2000)	Mgt. Lawyer	Clinton
56.	Peter Hurtgen (1997–___)	Mgt. Lawyer	Clinton
57.	John Truesdale* (1998–___)	Government	Clinton

